Universidade do Minho
Escola de Direito

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Corporate Criminal Liability: a possible path for Brazil in the fight against corruption?

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STATEMENT OF INTEGRITY

I hereby declare having conducted this academic work with integrity. I confirm that I have not used plagiarism or any form of undue use of information or falsification of results along the process leading to its elaboration.

I further declare that I have fully acknowledged the Code of Ethical Conduct of the University of Minho.

RESUMO

Esta dissertação pretende comparar mecanismos de controle e prevenção da corrupção aplicados internacionalmente com a legislação brasileira no combate à corrupção. É, portanto, importante estabelecer se os marcos regulatórios internacionais, adequados para o combate à corrupção corporativa, também podem ser aplicados na realidade das corporações brasileiras. Em outras palavras, ao utilizar os transplantes legais (direito internacional), é possível incentivar o Brasil a fazer as necessárias mudanças legislativas no combate à corrupção, ampliando o escopo da prevenção por meio do Compliance Criminal e a punição por meio de responsabilidade criminal das pessoas coletivas? Essa é a resposta que estamos buscando. O objetivo é confirmar se os programas de Compliance Criminal, em sendo mecanismos de autorregulação para prevenção e controle de riscos, trazem uma resposta efetiva à luta contra a corrupção corporativa. Além disso, pretendemos verificar a influência desses programas de Compliance em mecanismos de política criminal de Responsabilidade Penal das Pessoas Coletivas, estudando os diversos modelos usados em diferentes países, e se essas realidades podem ser transpostas para o sistema jurídico brasileiro.

Palavras-Chave: corrupção, Autorregulação Regulada, marcos regulatórios, globalização, gerenciamento de riscos, compliance criminal, responsabilidade penal das pessoas coletivas.

ABSTRACT

This dissertation intends to compare mechanisms of control and prevention of corruption applied internationally with the Brazilian legislation in combating corruption. It is, therefore, important to establish if the international suitable framework for combating corporate corruption is also necessary and suitable for the reality of Brazilian's corporations. In other words, by using legal transplants (international law), is it possible to encourage Brazil to make the necessary legislative changes in combating corruption, expanding the scope of prevention through criminal compliance and punishment through criminal liability of legal persons? That is the answer we are seeking for. The aim is to confirm whether criminal compliance programs, being mechanisms of enforced self-regulation of prevention and risk control, bring an effective response to the fight against corporate corruption. Furthermore, we intend to verify the influence of those programs on criminal policy mechanisms of criminal liability of legal entities, verifying the various models used in different countries, and whether these realities can be applied in the Brazilian legal system.

KEYWORDS: corruption, enforced self-regulation, regulatory framework, globalization, risk management, criminal compliance, corporate criminal liability.

TABLE OF CONTENTS

Acknowledgements ii

Resumo iv

Abstract v

Abbreviations iviii

1. The Crime of Corruption 12

1.1 Definition of Corruption 12

1.2 The origin of corruption in Brazil 16

1.3 The Operation Car Wash (The "Lava Jato" Case) 19

1.4 How to fight corruption? 21

2. The role of International Organizations in the Development of International Standards and Regulatory Anti-Corruption Framework 24

2.1 International Bodies for the Prevention and Combating Corruption and Related Crimes, and the pursuit of the standardization of criminal law 24

2.1.1 United Nations 25

2.1.2 European Union 26

2.1.3 Council of Europe 27

2.1.4 Financial Action Task Force (FATF) 27

2.1.5 Organization for Economic Cooperation and Development (OECD) 28

2.1.6 International Monetary Fund (IMF) 29

2.1.7 World Bank 30

2.2 The Main Regulatory Frameworks – Differences and Similarities with Brazilian Norms 30

2.2.1 Foreign Corrupt Practices Act – FCPA 31

2.2.2 The UK Bribery Act 32

2.2.3 Brazilian Regulations - The main Brazilian laws in combating corruption 33

2.2.4 Law No. 12,683, August 2012 – The Anti-Money Laundering Law 33

2.2.5 Law No. 12,846, August 2013 34

2.3 Conclusions 37

3. Criminal Compliance 39

3.1 The challenges of criminal law in the new globalized society 39

3.1.1 The development of capitalism and the expansion of criminal law within the business activities 40

3.1.2 Enforced Self-Regulation 44

3.1.3 Globalization, Risk Society and the concept of Governance, Risk and Compliance 47

3.2 The concept and the origin of Criminal Compliance – a brief explanation 52

3.3 The adoption of compliance duties in Brazil 58

3.4 Conclusions 62

4. Corporate Criminal Liability 64

4.1 The difficulties to control corporate crime 64

4.2 Corporate Culpability 66

4.3 Models of Corporate Criminal Liability adopted throughout the world 76

4.3.1 Model adopted by USA 76

4.3.2 Model adopted by the United Kingdom 79

4.3.3 Model adopted by Italy 81

4.3.4 Model adopted by Spain 84

4.3.5 Model adopted by Portugal 86

4.3.6 Model adopted by Chile 87

4.3.7 Model adopted in Brazil 89

4.4 Conclusions 91

5. References 94

ABBREVIATIONS

AML/CFT – Anti-Money Laundering and Combating the Financing of Terrorism

BA – The UK Bribery Act

CCL – Corporate Criminal Liability

COE – Council of Europe

DPA – Deferred Prosecution Agreement

EU – European Union

FATF – Financial Action Task Force

FCPA – Foreign Corrupt Practices Act

GRC – Governance, Risk and Compliance

IMF – International Monetary Fund

KYC – Know your Customer

MONEYVAL - The Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism

MPC – Model Penal Code

NPA – Non-Prosecution Agreement

OECD – Organisation for Economic Cooperation and Development

UK – United Kingdom

UN – United Nations

UNODC – United Nations Office on Drugs and Crime

USA – United States of America

USSC – United States Sentencing Commission

USSG – United States Sentencing Guidelines

INTRODUCTION

Corruption, terrorism, drug and weapons trafficking, among other crimes, are problems that afflict and reach the population worldwide. And it is through money laundering that the resources arising from these crimes begin to integrate the formal economy as if it were lawful money, enabling the perpetuation of the crimes and strengthening criminal organizations.

Unfortunately, we do not live in an ideal world, and the role of the State is not being fulfilled. The State's essential function is to ensure social welfare thus avoiding inequalities, through public policies aimed at maintaining public safety, health, education, housing, among other obligations. In Brazil, they are rights assured by the Federal Constitution, in its Art. 6. However, with more and more resources diverted through corruption, these sectors have been severely affected. Individual interests are overlapping the collective interests. Some States were captured by an organized network of agents who forget their role as public servants and only see their personal ambition, and this web of corruption has weakened national economies and, as a consequence, the confidence of the citizens in their Institutions.

I will try to show a legal approach of corruption, in the intention of showing why and how individuals, companies and States commits corrupt acts, and how can governments and society fight against it, the political will and available ways to tackle this crime, because the knowledge of illegal acts and that they are rarely punished increases the potential of corruption.

Institutionalised corruption is a very difficult task to tackle because of the power and the influence of those Institutions, companies and politicians involved. In Brazil, since the days of colonization, success and wealth are directly linked to power. And with the use of the private sector as an arm of the State[1], corruption has been institutionalised. And there is also the culture of: "if everyone does, I should also do", what is called by Brooks as a "technique of neutralisation"[2], and so tolerance with that kind of crime is increasing, making it socially acceptable. Organized crime networks are spreading throughout the country, and in all sectors of the Brazilian's economy.

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[1] See Brooks et al. (2013). *Preventing Corruption : Investigation, Enforcement and Governance.* Basingstoke : Palgrave Macmillan, p. 168.

[2] Brooks, G. (2016). *Criminology of Corruption.* London: Palgrave Macmillan, p. 23.

What encouraged me to write this dissertation was exactly the current moment by which Brazil passes through, with the need to review concepts and values to tackle the root of the problem of corruption. The Car Wash Operation began with an investigation of money laundering and focused on some black-market currency dealers and improper payments inside Petrobras, the biggest state-owned Brazilian company, and then it led to a wave of arrests and leniency agreements between the Attorney General of the Republic and the biggest construction and infrastructure companies, not to mention the politicians and their associates, that guided to an unthinkable complex web of corruption.

With the news of one of the world's greatest corruption scandals spreading across the globe, we try to pursue legal mechanisms to curb this network.

As we will see in the course of this work, corruption is not exclusive to the public sector, the private sector also plays a key role in this subject. With those mega scandals and frauds that occurred in large transnational corporations and affected the entire international market, the society foresees the need to regulate economic and financial activity. But the State alone was unable to regulate and monitor this implementation within the increasingly complex structure of the companies. Thus, the process of Enforced Self-regulation comes as a response to the inability of the State, that is, the State delegates to the particular the need to self-regulate and monitor the organization as a way to prevent the occurrence of frauds.

And knowing the importance of prevention in face of repression and control of criminality, the idea of Compliance arises, with structures and functions increasingly developed in order to prevent and, if not possible the prevention, surveillance and effective punishment of those responsible for the crimes. I will demonstrate the importance of Criminal Compliance programs, their advantages and their acceptance in the corporate world, in the search for the prevention of risks arising from the economic and financial activity and the consequent accountability of the legal person.

The criminal liability of the legal entity is currently used by most developed countries as a way of political-criminal policy to repress corporate crimes. The stigma and the weight of a criminal conviction cannot be compared to the weight of an administrative condemnation. In Brazil, although foreseen in the Federal Constitution of 1988 the possibility of criminal liability in cases of crimes against the environment and against the economic and financial order or against the popular economy, the reality of the Courts and of the doctrine is quite different, only accepting the administrative liability. But with international pressures for the harmonisation of criminal law by the major International Institutions concerned with

corruption, this can be changed. Some Bills of law foresee changes in the Brazilian Penal Code and infra-constitutional laws that can be a great help in combating corporate corruption.

Next, we will try to identify the influence of these programs on the criminal liability of legal persons and the models of accountability developed in the countries which adopted those systems, to then verify the compatibility with the Brazilian legal system.

1. THE CRIME OF CORRUPTION

1.1 Definition of Corruption

Although there is no single, comprehensive, universally accepted definition of corruption, according to United Nations' Global Program Against Corruption (UNODC)[3], I will try to show different concepts of what is corruption under three broader approaches: economic, political and legal, and how does culture, social norms and values impact on the different definitions of this type of crime, because sometimes what is a crime in one State can be seen as a morally accepted behaviour in others, maybe a "simple way of doing business". We can take as an example the lobby, regulated in the USA but in many other countries considered a corrupt act, or a facilitating payment[4], accepted in USA and Australia, but prohibited in the vast majority of countries.

There is, indeed, great difficulty among scholars to objectively define a practice whose main characteristic is perhaps the concealment itself.[5] There is also a great difficulty in identifying corrupt acts, considering the absence of individual victims in this type of crime, rare witnesses who are not involved in the illicit act, and the low visibility of the damage caused.

Despite being as old as humanity itself[6], nowadays the phenomenon of corruption has gained more notoriety in the media. The issues that were previously restricted to the national scope spread globally. Thus, corruption is no longer a local problem with specific characteristics of a particular society. It has become a global, transnational phenomenon, increasingly hindering its fight for dealing with diverse legal systems, diverse cultures and different mechanisms of control. With globalization and technological development, crimes are becoming increasingly dynamic and complex.

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[3] UNODC is a global leader in the fight against illicit drugs and international crime. Established in 1997 through a merger between the United Nations Drug Control Programme and the Centre for International Crime Prevention, UNODC operates in all regions of the world through an extensive network of field offices.

[4] OECD defines a payment to be a facilitating one if it is paid to government employees to speed up an administrative process where the outcome is already pre-determined.

[5] See Silva, M. (1992). Corrupção: tentativa de uma definição funcional, p. 18, Retrieved from FGV: http://bbibliotecadigital.fgv.br/ojs/index.php/rap/article/viewfile, Accessed in 09 Jan 2019.

[6] Holmes, L. (2015). *Corruption: a Very Short Introduction.* Oxford University Press.

With the development of the Internet and social media, the information began to spread much faster and began to encompass all social layers. Today the whole world is connected, and we have the impression that everything is new and that only now the cases of corruption extend through our society, which is a big mistake. Today we have more access to information, anyone has them in the palm of the hand, just with one click. But acts of corruption have been practiced since the beginning of mankind.

Looking in the Dictionary Houaiss of the Portuguese Language[7], we find that corruption is the effect or act of corrupting someone or something, in order to obtain advantages in relation to others by means deemed illegal or unlawful, a moral degradation of individuals and institutions. This term derives from the Latin word "*corruptio"*, which means breaking into pieces, deteriorating something or somebody.

According to Transparency International, corruption is the "abuse of entrusted power for private gain"[8].

The political philosopher Norberto Bobbio thinks that "Corruption designates the phenomenon by which a public official is led to act differently from the normative standards of the system, favouring particular interests in exchange for reward. Corrupt is therefore the illegal behaviour of those who play a role in the State structure."[9] And this includes, in addition to the civil servants, the participants of the three powers, executive, legislative and judiciary.

Pessanha affirms that corruption is a social, political, legal and economic phenomenon, which occurs through the use of power, or authority, for the achievement of advantages and for the use of public resources in the interest of the agent itself, or of persons indicated by him. It manifests itself through a favour, acceptance, and/or solicitation of financial resources for the practice of functional duties, or for omission, or diversion of public funds, among other practices.[10]

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[7] This dictionary, called "**Grande Dicionário Houaiss da Língua Portuguesa**" was drafted by Antonio Houaiss, and the first edition was launched in 2001, in Rio de Janeiro, Brazil, by Instituto Antônio Houaiss, becoming one of the most complete and popular Brazilian dictionaries.

[8] This international organization fights against corruption practices all over the world and discloses a rating, a Corruption Perception Index, scoring countries on how corrupt their public sectors are seen by businesspeople and experts in this issue, and reflects the analysis of the private sector's opinion on corruption in the public sector. In the 2018 ranking, besides appearing in the 105th position between 180 countries, close to countries like Armenia, East Timor, Zambia, El Salvador, among others, Brazil has been dropping countless positions year by year, according to the index. This is happening mainly due to the majority of the participants of the executive and legislative powers being involved in corruption scandals and the perception of corruption worsened at times like this, showing that there is still a long way to be pursued in the fight against corruption. Retrieved from Transparency International (2012). Corruption Peerception Index 2012. London: Transparency International. Retrieved from: https://transparency.org, Accessed in 12 Jan 2019

[9] See Bobbio et al. (1998). Dicionário de política. 11ed. Brasília: UnB, p. 291.

[10] See Pessanha, M. V. (2015, 03). *Jus*. Retrieved from: <https://jus.com.br/artigos/37008/antecedentes-juridicos-e-politicos-da-corrupcao-brasileira-como-nasceu-e-se-consolidou-a-corrupcao-em-nosso-pais>, Accessed in 09 Jan 2019.

Those definitions express what we call public sector corruption, the traditional view of corruption, in which the participation of the State through its agents is necessary for the qualification of illicit acts.

Like Pessanha, Brooks describes that there are common elements of corruption such as the misuse of power, the violation of trust and position, and personal or organizational financial benefit. These elements are not exhaustive, and an attempt to classify corruption is compounded by trying to review the social, cultural and legal attitudes towards it and which define it across jurisdictions. Even with a clear definition, which would be difficult, if not impossible, the measurement and secretive nature of corruption is difficult to police.[11]

In the words of Silva, the crime of corruption is a complex crime, not only by the type of criminality underlying it, but also by the serious social harm it entails and the discredit of the democratic institutions it carries. Thus, the definition of this offence, as well as the delimitation of the legal object that the framing of such conduct intends to defend, constitute a difficult task in the doctrine and jurisprudence. It is, however, that it is a crime that integrates organised crime and white-collar crime.[12]

It is observed that, for this school of thought, the triggering event that criminalizes corruption is the participation of the public agent acting for its own benefit to the detriment of public administration. Most scholars, including major organizations such as IMF and World Bank, see corruption as being a problem restricted to public sector.

This started to change with the enactment of the United Nations Convention against Corruption. The Convention provides measures for corruption prevention not only within the public sector, but also for the private sector, and requires States Parties to introduce in their legal systems criminal offences that comprise not only the basic forms of corruption, such as bribery and embezzlement of public funds, but also other acts that contribute to corruption, such as obstruction of justice, trading in influence and laundering of corruption proceeds.[13] And now this movement of criminalizing private corruption is a tendency, by virtue of Conventions and International Treaties.

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[11] See Brooks, G. (2016). *Criminology of Corruption.* London: Palgrave Macmillan; p. 7.

[12] See Silva, S.M. (2017,07). A Perseguição da Corrupção – Delação Premiada: Um Caminho Legítimo? *Dissertação de Mestrado em Direito Judiciário Universidade do Minho*. Braga, Portugal, p. 15.

[13] UN, Retrieved from United Nations Office on Drugs and Crime: <http://www.unodc.org/lpo-brazil/en/corrupcao/convencao.html>, Accessed in 06 Jan 2019.

The Brazilian law establishes that the crime of corruption exists only against public administration. There is no mention of corruption in the private sector in the Brazilian Penal Code. Brazil needs to adapt its legislation to the United Nations Convention against Corruption, signed in November 2006, for which it was obliged to typify bribery in the private sector. But the project of the new Brazilian Penal Code (Senate Bill No. 236 of 2012) that typifies private corruption in art. 167 (4), whose expected penalty is imprisonment, from 1 to 4 years, currently in 2019, is still standing on the Senate Constitution, Justice and Citizenship Committee. It should be noted, however, that this penalty is considerably lower than those provided for in the current Penal Code for corruption offenses in the public sector (imprisonment, from 2 to 12 years, and fine).

The EU Member States are at the forefront of Brazil in this area, foreseeing in their domestic legislations the private corruption. In the United Kingdom, the Bribery Act 2010 regulates corruption as a general offense, which encompasses both the public and the private sphere. Germany, France, Netherland, Belgium, Italy, among others, includes this type of crime into their Criminal Code.

Although we have already commented on the United Nations Convention against Corruption, the starting point for International agreements on combating corruption was the Foreign Corrupt Practice Act (FCPA), enacted in 1977 in the United States of America. The anti-bribery provisions of this Act were created to prohibit entities or persons to make payments to foreign government officials in obtaining or retaining business. Those provisions also apply to foreign firms and persons who cause, directly or through agents, an act in furtherance of such a corrupt payment to take place within the territory of the United States. By pressure from USA, other International Conventions have been held to export the criminal provisions of the FCPA to the rest of the world, like the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, in 1997; The EU Convention against Corruption, in 1997; the Council of Europe Criminal Law Convention on Corruption, in 1999; The United Nations Convention against Transnational Organized Crime, in 2000; The United Nations Convention against Corruption, in 2003; among others. These are the most prominent and globally used and that will be discussed hereinafter.

However, no matter what concept we are based on, public or private, what is already known is that corruption affects the society as a whole, directly or indirectly: individuals, governments and companies. With the diversion of public resources for illicit purposes, that should be destined for public

safety, basic sanitation, education and health, the money goes straight into the pockets of unscrupulous politicians and businessmen, leaving ordinary citizens at the mercy of a scrapped state, that does not comply with their basic social duties. Corruption weakens democratic institutions and increases political instability, affects market economy and free competition.

Fighting against corruption, therefore, depends on the joint and continuous effort of all the society, including individuals and companies, members of all legislative, executive and judicial powers, not forgetting the power of surveillance and dissemination of news from all media channels.

That is to say, corruption is the effect or act of corrupting something or someone, to obtain illegal individual advantages. The inherent greed for money and selfishness of the human being makes the corrupt agent privilege individual benefit to the detriment of the collective interest. The low level of political education of the society as a whole is directly linked to the practice of corruption, which ends up accepting the corrupt system by nature. Social and financial damages are immeasurable. And this becomes a vicious circle because the greater the corruption, the lower the resources employed in the education of the people, since there is no interest of the corrupt political class in the education of the population.

For corruption to be configured, there is a need for at least two subjects: the corruptor and the corrupted one. Barros Filho already said that "The word corruption consists of two elements: rupture and Co. [...] For corruption, there must be at least two. There is no solitary corruption in isolation. [...] Thus, all corruption is necessarily an orchestrated, joint operation in a meeting."[14] The search for the end of corruption should also be an orchestrated struggle between all sectors of society, and mainly to fight for an ethical culture and compliance with norms within companies, public or private, so that perhaps we can achieve this goal.

1.2 The origin of corruption in Brazil

[14] See Barros Filho, C.; Praça, S. (2014*). Corrupção: Parceria degenerativa*. Campinas, SP: Papirus 7 Mares, p. 23.

Corruption for Brazilians is not a recent subject, in the news as well as in everyday life. Brazilians are used to making small daily acts of corruption into ordinary acts, based on the theory "that everyone does the same thing", which Brooks describes as a technique of neutralization[15]. Corruption can manifest itself through illegal acts or acts that do not necessarily violate the law but are immoral, and moral concepts are quite subjective, what with the reiterated practice of these acts, can become socially acceptable, thus creating a culture of leniency with transgressions. And these transgressions clearly have a systemic scope, covering not only all the spheres of public administration, but also being emblematic in the private sphere.

The culture of Brazilian corruption refers to the formation of the Brazilian State since the time of discovery in the period of colonization. Portugal did not have, in relation to Brazil, a project of constitution of a nation or settlement, but only the intention of exploitation and commercialisation. There was no separation between the King's Treasury and the Treasury of the kingdom. At that time, corrupt practices were seen naturally accepted by the Portuguese State and consisted in the distribution of favours by the sovereign. The confusion between the public and the private was the rule, and the distance from the colony made patrimonial practices an integral part of the Brazilian State's origin.[16]

With this behaviour emerged the great social inequalities, with the majority of the population. Despite being foreseen in the Federal Constitution, art. 5, caput, the principle of equality, where "people are equal before the law, without distinction of any kind, guaranteeing to Brazilians and foreigners residing in the country the inviolability of the right to life, freedom, equality, security and property", it is not the reality that we can envisage since Colonial times. With an immense range of distribution of privileges created in defence of the aristocratic elites, remaining high until the present day, those social, material and minority recognition inequalities are being intensified. The privileged jurisdiction is one of the greatest examples of these disparities. It is an institute by which only specific higher courts of the Brazilian judicial structure have the power to prosecute and judge certain authorities due to their political or functional position (like parliament members, government ministers, president and vice-president and members of the higher courts, among others). Although it was created for relevant purposes, in order to avoid political and electoral conflicts, manipulation of Justice by political motives, thus giving more promptness to the

[15] Brooks describes that techniques of neutralisation permits violations in certain cases without rejecting conventional behaviour completely in Brooks, G. (2016). *Criminology of Corruption.* London: Palgrave Macmillan p. 107.

[16] Retrieved from <https://jus.com.br/artigos/37008/antecedentes-juridicos-e-politicos-da-corrupcao-brasileira-como-nasceu-e-se-consolidou-a-corrupcao-em-nosso-pais> Accessed in 10 Dez 2018.

processes of these authorities, this special forum for the prerogative of function brings exactly the opposite, the processes takes too long and increases the possibility of prescription and impunity. It also occurs due to the range of authorities protected by the Federal Constitution of 1988 is immense, hindering the work of the Superior Courts, thus increasing exponentially an excessive number of processes in the hands of few ministers.

As Camargo describeso, “there are three ''colonial pillars'' that support inequality: the Iberian influence, the standards of possession bonds of latifundios (large estates) and slavery.”[17] Brazil’s continental size and the politics centred in strong regional centres, with the same political groups consolidating in power for decades enhances those problems, favoured injustices and corruption throughout the country.

Luis Roberto Barroso, Minister of the Federal Supreme Court of Brazil, during a Harvard Brazil Conference, in 2017, tried to explain the famous “jeitinho brasileiro”, “the Brazilian way of doing things”[18]. An intrinsic behaviour of Brazilians culturally developed and accepted as natural. He describes that those characteristics reveal some serious civilizational defects. In its most common sense, the way it identifies the behaviours of an individual aimed at solving problems by informal means, varying from the use of sympathy to simple corruption. In essence, this way involves a personalisation of relationships, in order to create particular rules for themselves, breaking social or legal norms that should apply to all. It is about individualism, personal advantages becoming more important than the norms of collective social conduct.

Small breaches of social norms and illegal or immoral conducts, like small frauds and crimes, are becoming increasingly frequent in the daily life of Brazilians and taking very high proportions in all sectors of the production chain. The Brazilian citizen is a great critic of the corrupt acts performed by another citizen but has a huge difficulty in seeing their own corrupt acts, what Goes and Biasetto call “moral elasticity”[19], thus demonstrating the lack of a citizen awareness and concern for others.

The political corruption is the most serious, because it is intrinsically related to corruption inside private companies. With an ideological project of perpetuation of power, the dominant political class in

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[17] As Camargo says: The owner of the land is the one who has the political power” in CAMARGO, Orson. ''Desigualdade social''; Brasil Escola. Retrieved from <https://brasilescola.uol.com.br/sociologia/classes-sociais.htm>. Accessed in 09 Jan 2019.

[18] See Barroso, L.R. (2011). Retrieved from <https:// https://www.conjur.com.br/dl/palestra-barroso-jeitinho-brasileiro.pdf> Accessed in 09 Jan 2019.

[19] See Goes, B., & Biasetto, D. (2016, 03 27). *O Globo*. Retrieved from Globo: https://oglobo.globo.com/brasil/corrupto-o-outro-18961820, Accessed in 10 Apr 2019.

Brazil uses illicit means to buy its eternalization, distorting the figure of the State through the sale of positions in State-owned enterprises and the sale of votes of congressmen, with undeclared financial schemes collecting money for them and their political parties.

But the problems go beyond the historical and cultural reasons of Brazilian colonization, the Brazilian corruption is due much more of impunity, permissive laws, lack of legislative initiative for stricter laws, and lack of initiative to pursue criminals, that usually have high positions, whether within the government, in society or in large companies.

The driving force of these crimes to perpetuate has always been impunity. The "certainty" that would not be discovered, and if discovered, would not be punished, encouraged criminal behaviour, transforming corruption in a systemic and endemic mechanism of making money easily throughout the country.

1.3 The Operation Car Wash (The "Lava Jato" Case)

Recent corruption scandals in Brazil have become one of the world's most commented subjects. I say recent because although they have been happening for centuries, only in the last decade it was actually disclosed by the media, investigated by the Federal Police and punished by the Brazilian Judiciary. The institutions charged with investigating and incriminating corrupts, like Federal Police and Public Prosecution, instead of acting alone, joined their efforts to present to the Judiciary investigations with more evidences and the punishment that could be ever achieved, or at least initiated the process of punishment, for there is still a long way to go.

Operation Car Wash is considered the largest investigation of corruption and money laundering that has ever occurred in Brazil, according to the Federal Police.[20] It all started with a complaint of a businessman reporting the scheme to launder money through his own company. Those investigations began in 2009, analysing the conduct of four black market dealers, heads of criminal organizations. But the Operation only started at 2014, seeking to disrupt those gangs of criminals. With the arrest of Alberto

[20] Ministério Público Federal (2015). Entenda o caso. Retrieved from: <http://lavajato.mpf.mp.br/entenda-o-caso.> Accessed in 23 Jan 2019.

Youssef, one of the dealers, and by signing the Leniency Agreement[21], he revealed the entire scheme of corruption, exposing the names and companies involved.

Those disclosures resulted in a chain reaction, by making other people involved to have the same attitude, giving more and more names by using the same mechanism of leniency agreements, generating various ramifications of the original Operation, and revealing other corruption schemes. Despite being an extremely controversial subject and not being accepted in many countries, Leniency Agreements have been of extreme value in Brazil in cases of crimes against economy and unfair competition, to dismantle networks of corruption and cartels.

The name of the operation comes from the place where the dealers used as the "Head Office", a gas station where also operated a car wash in Brasilia, Brazil's capital.

The then Federal judge Sérgio Moro, current Minister of Justice, which was responsible for the processes of Car Wash Operation in the first instance until 2018, attending a meeting with members of Paraná's Judges School, said that "The criminalisation of money laundering facilitates the investigation and criminal accountability of those who, in the context of criminal activity, perform functions of command. Listen to the old North American advice: follow the money, and you will find out who is the boss and the responsible for the crime".[22] And so, through a complaint, and following the money from the origin that they discovered the names of those responsible for the crimes of corruption, active and passive.

Payments were found through these dealers to senior executives of the Brazilian state-owned company called Petrobras[23], to politicians and other public agents arising from bribes paid by large contractors, which formed cartels to defraud bids and to overtake contract prices. The amounts raised with the overbilling were divided between the companies and Petrobras' executives, who transferred part of the resources to politicians and their political parties. Therefore, a huge network of corruption was discovered, involving not only Petrobras, but other Brazilian state-owned companies and their respective Pension Funds, also involved in embezzlement of public funds.

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[21] In those Leniency Agreements, companies can reduce the applicable fines by up to two-thirds and be exempted from judicial and administrative sanctions. To qualify for leniency, the cooperation must result in the identification of other individuals or legal entities involved in the illicit conduct. The company must be the first in cooperating, must cease its involvement in the investigated wrongdoing, admit its participation and fully cooperate with the investigation.

[22] Sergio Moro says "Siga o dinheiro e você descobrirá quem é o chefe do crime". G1, 03 mar 2015. Retrieved from: <http:// http://g1.globo.com/pr/parana/noticia/2015/03/siga-o-dinheiro-e-voce-descobrira-quem-e-o-chefe-do-crime-diz-moro.html> Accessed in 24 Jan 2019.

[23] Petrobras – Petroleo Brasileiro S.A. is a Brazilian oil and gas multinational Corporation in the petroleum industry, a public company majority-owned by the state.

With these scandals, we can foresee the need to address the problem preventively within companies through the culture of ethical and moral standards and a well-structured compliance culture to prevent problems of corporate corruption from continuing to exist. I believe that prevention is still the best choice, but we must not forget the need for fast and effective punishment and accountability of corrupt actors so that we can achieve a more just and honest society.

1.4 How to fight corruption?

Taking as a basis the Operation Car Wash to describe the systemic character of corruption in Brazil, it is clear the lack of respect of those involved in the aforementioned crimes, the prevailing of the particular interest above the collective, and the disregard for norms, bearing in mind the impunity that remarked until then, and unfortunately persists. Extremely slow processes, with countless judicial remedies, encouraging prescription, and permissive legislation, with a lack of incentives for companies to comply with the laws, and especially the lack of surveillance intensifies the problems.

Only a combination of factors can change the course of preventing crimes of this kind from occurring. Currently, the pressure for moral and ethical values, an exempt and efficient judiciary, more rigid and effective laws avoiding impunity, the change of habits of the whole society in an extremely bureaucratic system, as is the case of Brazil, a focus on the quality and effectiveness of education, respect for the laws and effective punishment of criminals of any social class, legal and institutional reforms that attack the root cause of the problem are possible good beginnings in this struggle.

As already mentioned, the financial and social costs with corruption are immeasurable, not to mention the harm to the free market economy. The trivialization of corruption brings serious prejudice to society and to honest companies, who do not participate in cartels and so they do not compete equally with the corrupt ones.

I believe that corrupt behaviour can be prevented if we increase the chances of discovery and effective punishment. Through the strengthening of the monitoring forces of the anti-corruption bodies, we can avoid those criminal systems. It is essential that, in addition to political, institutional and legislative reforms, we must create an environment that is more attractive to comply with the rules than to corrupt.

Companies will only become less corrupt if the legislation creates financial advantages. Currently, the Brazilian anti-corruption law does not oblige companies to have a compliance mechanism, having only the benefit in measuring the penalty.

Adopting rules of good governance, with the establishment of ethics and transparent standards of conduct, both in the public and private sectors, with well- structured Compliance mechanisms is the right way to that change of course we need. Based on transnational anti-corruption legislation, we can see the development of Corporate Criminal Liability rules, what can be a pathway for successful achieving good results in the war against corruption.

And more than ever, the most important thing is the fight for accountability, to restore public trust in political institutions and the policy process after malfeasance has been uncovered[24], so that we can redeem credibility in the democratic institutions, currently so discredited. As Brooks said, "only systemic responses can reverse systemic corruption"[25].

The participation of business community in combating this type of crime is essential for the weakening of the illegal structure of "exchange of favours" and illegal pecuniary benefits. Moreover, the adoption of preventive practices is already widely disseminated in international legislations and taking an *ex ante* position to inhibit those criminal acts within its borders, the scope becomes transnational, because with globalization the companies have establishments in many countries, and following criminal compliance measures, all companies will be key actors in the search for a fairer global market.

In order to deal with this, Compliance structures are increasing in importance and acceptance. These structures were created in order to comply with legal obligations inside the organizations, as well as to supervise and prevent failures and crimes, with the aim of facilitating the risk management.[26]

With the aim of creating ways to extinguish the practice of transnational corruption disseminated with globalisation, and also to harmonize provisions concerning the issue of corruption in the legal systems of each sovereign country, International Institutions were created. These institutions draw up International Conventions and Treaties, with a very important role for this harmonisation. International

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[24] See Power, T. J.; Taylor, M. M. (2011). *Corruption and Democracy in Brazil: The Struggle for Accountability.* Indiana: University of Notre Dame Press, p. 9.

[25] Brooks, G. (2016). Criminology of Corruption. London: Palgrave Macmillan, p. 138.

[26] Sarcedo, L. (2014). Responsabilidade Penal da Pessoa Jurídica: Construção de um novo modelo de imputação, baseado na Culpabilidade Corporativa. *Tese de Doutorado Faculdade de Direito da Universidade de São Paulo*. São Paulo, p. 16.

legal cooperation becomes swifter and more efficient, taking into account not only the interests of a State, but of the entire global community.[27]

[27] See Marques, S. A. (2010). *Improbidade Administrativa: ação civil e cooperação jurídica internacional.* São Paulo: Saraiva, p. 234.

2. THE ROLE OF INTERNATIONAL ORGANIZATIONS IN THE DEVELOPMENT OF INTERNATIONAL STANDARDS AND REGULATORY ANTI-CORRUPTION FRAMEWORK

2.1 International Bodies for the Prevention and Combating Corruption and Related Crimes, and the pursuit of the standardization of criminal law

Corruption, money laundering and related crimes are extremely harmful to good governance in companies and States, because it can directly influence the development of the economy at global levels. Concealment of assets usually occurs in tax havens, where an information exchange policy is extremely necessary both during the investigation and in the resumption of the diverted values.

And that is why the struggle to combat these crimes is so evident in the international agenda. International Organizations play a key part in promoting cooperation initiatives at international level to prevent and combat money laundering. Because this is not the objective of the present study, I will only describe the main organisms that play the most relevant role.

International Conventions are extremely important in defining the fundamental points to be followed by Member States that must implement in their domestic legislation, establishing rights and obligations for the Contracting Parties at a global level.

Conventions define that corporations must be held liable according with national law, be civil, administrative or criminal liability. Many States, including Brazil, do not recognize Corporate Criminal Liability for corporations, only Civil and Administrative Liability. However, currently, Criminal liability of corporations is thus an international practice and we will try to discuss the advantages and disadvantages of this type of liability in the course of the research.

The New Era of globalization and of new technologies have disseminated transnational corruption. Thus, it is necessary to create international legislation to avoid or eliminate these criminal organizations.

2.1.1 United Nations

United Nations is an international organization founded in 1945, being the most influent and important Institution nowadays. It is currently made up of 193 Member States. UN can take action on the issues confronting humanity in the 21st century, such as peace and security, climate change, sustainable development, human rights, disarmament, terrorism, humanitarian and health emergencies, gender equality, governance, food production, and more[28]. The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, known as the Vienna Convention, was the first to create an obligation upon Member States that ratified the Convention to criminalize, inside their domestic legal system, money laundering from narco-trafficking; enable international cooperation to facilitate transnational investigations; as well as facilitating extradition and international forfeiture of narco-trafficker's assets.

Hereinafter, another important instrument is the International Convention for the Suppression of the Financing of Terrorism, that requires parties to prevent and counteract the financing of terrorism; commits States to hold those who finance terrorism criminal, civil or administratively liable for such acts; compels Financial Institutions of monitoring financial operations, mainly cash money; strengthening the exchange of information mechanisms between countries, as well as forfeiture of assets' mechanisms; and provides for the identification, freezing and seizure of funds allocated for terrorist activities. And last but not least, the reinforcement of judicial agreements to allow breach of bank secrecy.

The United Nations Convention against Transnational Organized Crime, approved in 2000, widened the criminalization of money laundering and related crimes, expanding responsibilities of Financial Institutions, through detection and maintenance of identification of their customers, forcing them to report, to the competent authorities, suspicious financial transactions.

In 2003, most of the UN Member States ratified the United Nations Convention against Corruption, which is the only legally binding universal anti-corruption instrument. The Merida's Convention main objective is to stop corruption-related flows of money, that comes from crimes like terrorism or drug trafficking, by expanding international cooperation, developing instruments of mutual legal assistance, extradition and the exchange of information.

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[28] United Nations (1945). Retrieved from United Nations: http://www.un.org/en/sections/about-un/overview/ Accessed in 12 Dec 2018.

2.1.2 European Union

The European Union is a unified trade and monetary body of 28-member countries[29], with no border controls between them, allowing the free movement of goods and services, people, establishment and capital. Its purpose is to create a single market to be more competitive in the global marketplace, despite of these Member States continue to have their fiscal and political sovereignty.

Up to this moment, European Union approved five Anti-Money Laundering Directives. The EU directive 2018/843 (AMLD5) has entered into force on 9 July 2018, thus amending and repealing the precedent AMLD4, EU Directive 2015/849. Member States must implement into their national legislation these main goals: the interconnection of all national registers (via the European Central Platform) to promote cooperation between EU Member States, in order to enhance transparency on the information "of any natural or legal persons holding or controlling payment accounts and bank accounts, identified by IBAN, as defined by Regulation (EU) No 260/2012 of the European Parliament and of the Council , and safe-deposit boxes held by a credit institution within their territory". This facilitates the identification of the real beneficial owners of companies operating within EU.

And for the first time the European Parliament approaches the issue of the risks that virtual currencies bring to the economy, increasing the responsibility of Member States to monitor the use of virtual currencies. Another important change was the need to strengthen due diligence measures on transactions involving high-risk third countries.

The conventions that we cannot fail to mention are the European Union Convention against Corruption involving Officials, and European Union Convention on the Protection of the European Communities' Financial Interests, criminalizing corruption and defining responsibilities within the European Union Member States.

[29] The EU's 28 member countries are: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. That will drop to 27 when Brexit causes the United Kingdom to leave the EU in 2019.

2.1.3 Council of Europe

Established in 1949, the Council of Europe is an important international organization that strives to foster the democratic development and, mainly, the protection of human rights in Europe. Currently, 47 European States are members, including all 28 States that are part of the European Union.

In 1990, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, the first legally binding document was signed, despite of having little acceptance at international scope. In 2005, the Council of Europe decided to update and widen its 1990 Convention to consider the fact that not only could terrorism be financed through money laundering from criminal activity, but also through legitimate activities.

The Criminal Law Convention on Corruption, from 1999, is an instrument aiming at the co-ordinated criminalisation of corrupt practices. It also provides for complementary criminal law measures and for improved international co-operation in the prosecution of corruption offences. The Convention is open to the accession of non-member States.

The Council of Europe has a permanent monitoring body called The Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism – MONEYVAL, entrusted with the task of assessing compliance with the principal international standards to counter money laundering and the financing of terrorism and the effectiveness of their implementation, as well as with the task of making recommendations to national authorities in respect of necessary improvements to their systems.[30]

2.1.4 Financial Action Task Force (FATF)

The Financial Action Task Force (FATF) is a "policy-making" inter-governmental body established in 1989 by a Group of Seven (G-7) Summit in Paris. FATF was created with the aim of developing an overall strategy for preventing and combating money laundering and terrorist financing, being recognised

[30] Council of Europe: Retrieved from https://www.coe.int/en/web/moneyval, Accessed in 05 dec 2018.

internationally by setting important standards in this issue. The FATF works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas.

FATF comprises 36 countries and 2 regional organisations, representing most major financial centres in all parts of the globe.[31]

The FATF has developed a series of Recommendations that are recognised as international standards for combating of money laundering, financing of terrorism and proliferation of weapons of mass destruction. They form the basis for a co-ordinated response to those threats to the integrity of the financial system and help ensure a level playing field. First issued in 1990, the FATF Recommendations were recently revised in 2012 to ensure that they remain up to date and relevant. The FATF monitors the progress of its members in implementing necessary measures, reviews money laundering and terrorist financing techniques and counter-measures and promotes the adoption and implementation of appropriate measures globally. In collaboration with other international organizations, the FATF works to identify national-level vulnerabilities with the aim of protecting the international financial system from misuse.

2.1.5 Organization for Economic Cooperation and Development (OECD)

OECD is an international institution based in Paris, founded in 1961, with 35 members[32], for the purpose of helping States with economic and social challenges of a globalized economy, having as parties the most industrialised countries.

The OECD's work on tax crime and money laundering is designed to complement what is carried out by FATF. The OECD Anti-Bribery Convention establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions and provides for a host of related

[31] Members of the FATF: Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Denmark, European Commission, Finland, France, Germany, Greece, Gulf Co-Operation Council, Hong Kong, Iceland, India, Ireland, Israel, Italy, Japan, Republic of Korea, Luxembourg, Malaysia, Mexico, Netherlands, New Zealand, Norway, Portugal, Russian Federation, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States.

[32] Members of the OECD: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Switzerland, Turkey, United Kingdom and United States.

measures that make this effective. It is the first and only international anti-corruption instrument focused on the 'supply side' of the bribery transaction. It obliges the signatories to criminalize briberies for business across borders. It further obliges all signatories to install a detection, transparency and enforcement regime and in particular to engage in a formal two-stage peer-review process for compliance[33].

Member States are also obligated to enact and implement domestic legislation conforming to the Convention's standards and implement appropriate mechanisms to avoid illicit acts of bribery. Article 2 of the Convention requires that: "Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official." This allows for different approaches of different impositions of liabilities of legal persons in the bribery of a foreign public official (civil, administrative or criminal corporate liability) in accordance with the core principles of their legal systems.

2.1.6 International Monetary Fund (IMF)

Created in 1945 by the UN on the basis of the Bretton Woods agreements, the International Monetary Fund (IMF) is an organization of 189 countries, working to foster global monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty around the world[34], facilitating development by influencing on countries' economic policies as a condition of obtaining loans, debt relief and financial aid. It also offers loans to poorer countries.

The IMF's role in combating money laundering is the great experience it has in conducting financial assessments, technical assistance and inspection of member exchange systems, contributing to the FATF with other key international organizations, like the World Bank and the UN. In 2009, the IMF launched a donor-supported trust fund to finance AML/CFT capacity development in its member countries.

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[33] OECD, retrieved from OECD: http://www.oecd.org, Accessed in 15 Dec 2018.

[34] IMF. Retrieved from https://www.imf.org/en/, Accessed in 05 Dec 2018.

2.1.7 World Bank

Founded in 1944 and located in Washington DC, USA, the International Bank for Reconstruction and Development, that turned into the World Bank, helped rebuild countries devastated by World War II. Nowadays, the focus shifted from reconstruction to development.

With 189-member countries, the World Bank is a partnership of five institutions (International Bank for reconstruction and development, International Development Association, International Finance Corporation, Multilateral Investment Guarantee Agency and the International Centre for Settlement of Investment Disputes) in order to reduce poverty and build shared prosperity in developing countries and became one of the world's largest sources of funding and knowledge for developing countries.

Currently, for the granting of financing, interested parties are obliged to implement preventive compliance measures to control and avoid criminal and anti-corruption conducts.

The World Bank Group's technical work on AML/CFT has helped 65 client countries adopt reforms that have strengthened their AML/CFT regimes. Most of those reforms involved legislation, with more than 50 countries establishing or revising their AML/CFT legal framework to tackle the illicit flow of money[35].

2.2 The Main Regulatory Frameworks – Differences and Similarities with Brazilian Norms

[35] World Bank. Retrieved from https://www.worldbank.org/en/topic/financialmarketintegrity. Accessed in 05 dec 2018.

2.2.1 Foreign Corrupt Practices Act – FCPA

The Foreign Corrupt Practices Act has been a precursor and served as an inspiration to international Anti-corruption standards. The United States was the first nation that criminalized the extraterritorial payment of bribes by domestic companies.

The Resource Guide to the U.S. Foreign Corrupt Practices Act states the following: "Congress enacted the U.S. Foreign Corrupt Practices Act (FCPA or the Act) in 1977 in response to revelations of widespread bribery of foreign officials by U.S. companies. The Act was intended to halt those corrupt practices, create a level playing field for honest businesses, and restore public confidence in the integrity of the marketplace"[36].

In other words, the U.S. was experiencing a serious institutional crisis due to the Watergate scandal and other corruption scandals involving US Corporations and needed to restore people's trust in American institutions and the American marketplace as a whole, in addition to improving their image abroad. For this reason, the FCPA was enacted, although being considered extremely severe by global standards but necessary for the acclaimed purposes. Before 1998, the law only granted jurisdiction over the U.S. issuers[37] and national companies. This has put American companies competing abroad at a disadvantage to foreign companies who could continue to commit bribery in their business practices in exchange for benefits. In 1998, significant changes in the Act have expanded its jurisdiction to include certain foreign persons and extending the scope beyond U.S. borders. Since then, foreign persons and foreign non-issuer entities that, either directly or through an agent, engage in any act in furtherance of a corrupt payment (or an offer, promise, or authorization to pay) while in the territory of the United States, commit a crime under FCPA Act. Also, officers, directors, employees, agents, or stockholders acting on behalf of such persons or entities may be subject to the FCPA's anti-bribery prohibitions.[38]

Jurisdiction based on nationality is applicable to U.S. companies and issuers, may be triggered by an act that occurs entirely outside the United States, provided that the act occurs with the intention of improperly benefiting from an illicit payment in exchange for that advantage.

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[36] USA (2012). A Resource Guide to the U.S. Foreign Corrupt Practices Act, p. 2.

[37] U.S. and foreign public companies listed on stock exchanges in the United States or which are required to file periodic reports with the Securities and Exchange Commission.

[38] USA (2012). A Resource Guide to the U.S. Foreign Corrupt Practices Act, p. 11.

However, in believing that U.S. companies are at a disadvantage in world trade, the U.S. has commanded the negotiations in the Organization of Economic Cooperation and Development (OECD) to introduce international legislation similar to the FCPA, and in 1997 the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) was enacted. Establishing legally binding standards to criminalise bribery of foreign public officials in international business transactions, the OECD Convention pressed the signatory countries to establish domestic laws that effectively punish bribery cases, which was the case for UK, that we will see below.

2.2.2 The UK Bribery Act

The United Kingdom, by being pushed by the OECD Working Group on Bribery in International Business Transactions (WGB), for having ratified the Convention and not adapting its own legislation to combat transnational bribery, enacted the Bribery Act in 2010. BA is intended to consolidate the statutory and common law offence of bribery.

In one single law, UK unifies all of its anticorruption legislation. By defining the crimes of active and passive corruption in Sections 1 and 2, the legislator makes no difference whether it is in the public or private sector, both are covered by the law. The tests for improper actions are provided under Section 3 of the BA. This involves the assessment of whether the person performing the relevant activity is undertaking it in good faith, with impartiality; or is in a position of trust, and importantly whether the action breaches the relevant expectations.

The person, who has a certain function, will act improperly when there is a breach in the performance that should have been performed. The Bribery Act establishes, in its section 5, that this notion of adequate expectation will be understood within the standards and values expected by a reasonable person in the United Kingdom, in relation to that particular function, and by judicial decisions or written statutes. [39]

BA under Section 7 provides for a new offence called "failure of commercial organisations to prevent bribery", with the intention of applying strict criminal liability of the legal person, due to its failure

[39] See Pinto, N. R. (2016). A importância dos Marcos Regulatórios na prevenção à criminalidade econômica. *Dissertação de Mestrado Faculdade Direito da Universidade de São Paulo*, p. 79.

to prevent the practice of bribery by persons acting on their behalf, provided that the criminal conduct was intended to bring some advantage for the company's business. And it forces corporations to institute effective procedures to prevent bribery, such as corporate codes of conduct, internal trainings, contractual provisions, and "triple bottom line" auditing[40], avoiding of incurring risks of accountability for breach of their legal duty. The development of compliance measures acts as a mechanism of legitimate defence of the company by incurring in a corrupt act, and those companies who have preventive programs have their liability analysed subjectively. We can verify similar legislation in the Swiss Penal code, Art 102, and in Italian Legislative Decree No. 231/2001.

The extra-territorial reach of the UK Bribery Act is another important issue to be mentioned. This expansion of the criminal jurisdiction creates an extreme situation when this connection to the UK is not even required, so that the crime is judged by British law. It impacts significantly on many foreign companies which carries on any "part of a business" in the UK. They can be prosecuted under the Bribery Act for failing to prevent bribery committed by any of its employees, agents or other representatives, even if the bribery takes place outside the UK and involves non-UK persons.

The Ministry of Justice enacted the Bribery Act 2010 Guidance to help commercial organisations understand the sorts of procedures, but this guidance does not provide a complete answer to describe what is "part of a business", leaving to the courts the role of defining whether the UK jurisdiction applies or not, which generates a lot of discretion in the hands of the judges.

2.2.3 Brazilian Regulations - The main Brazilian laws in combating corruption

2.2.3.1 Law No. 12,683, August 2012 – The Anti-Money Laundering Law

The last anti-money laundering law in Brazil was enacted in 2012 (Law No. 12,683/2012), amending the previous law (Law No. 9,613/98), and proposing considerable modifications: the suppression of the restrictive list of crimes, and also sought to stimulate the adoption of mechanisms of

[40] See Engle, E. (2010). I Get by with a Little Help from My Friends? Understanding the U.K. Anti-Bribery Statute, by Reference to the OECD Convention and the Foreign Corrupt Practices Act. *The International Lawyer*, p. 1188.

compliance and operational improvement of the Financial Intelligence Unit, especially in the field of Financial Institutions, thus stimulating the prevention of economic crimes. The modifications have enhanced the concern of the compliance officer and its gatekeeper position.

The individuals and legal entities subject to those compliance mechanisms are obliged to identify clients and maintain registrations (through the policy of "know your customer"), the registration of transactions and the communication of suspicious operations to the unit of Financial Intelligence.

Law No. 12,683/2012 expanded the scope of the subjects obliged to compliance duties: boards of trade and public registries; Individuals or legal entities that provide advisory services, consulting, accounting, auditing, counselling or assistance of any kind, in transactions for the purchase and sale of real estate or equity holdings, of fund management, securities or other assets, the opening or management of bank accounts, savings, investment or securities, creation, exploitation or management of companies of any kind, financial, corporate or real estate, of alienation or acquisition of rights on contracts related to professional sporting or artistic activities; individuals or legal entities acting in the promotion, intermediation, marketing, agency or negotiation of rights of transferring athletes, artists or fairs, exhibitions or similar events; cash transportation companies; individuals or corporations who commercialize goods of high value of rural or animal origin or mediate their trading, all are obliged, by law, to adopt compliance measures, to a greater or lesser extent.

I believe that this new law, specifying the need of compliance duties, was a major breakthrough in the fight against corruption and money laundering, so that we can finally achieve the desired ends. Even though with inefficient supervisory Institutions, it will be very difficult to fight against corporate corruption.

2.2.3.2 Law No. 12,846, August 2013

In order to adapting domestic legislation to the International Anti-Corruption Conventions to which Brazil is a signatory, the law No. 12,846 of 2013 was enacted. Punishable conducts in the Brazilian norm aim to impose civil and administrative liability of legal entities, national or foreign with subsidiaries or branches in Brazilian territory, that commits violations against Public Administration. However, liability of the natural person which directly committed the illicit act subsists.

The Law has as one of the main innovations the displacement of the persecution focus from the individual to the organization, and the strict liability of the legal persons, a theme that has been the centre of debates of Brazilian scholars about their constitutionality.[41]

According to the Brazilian anti-corruption law, strict liability is applied to the legal entities, which are involved in a corrupt practice, independent of culpability, that is to say, without the need for proof of guilt or intent of the legal entities involved. So, if the company incurred in one of the crimes provided for in art. 5 of Law No. 12,846/2013 and that such acts were committed in the interest or benefit of the legal entity, it is enough to establish the liability of the legal person. The company can be held liable once the fact, the result and the causal link between them can be verified. Thus, the difficulty of proving subjective elements (the real intent of the agent) is excluded, greatly improving the probability of punishment.

The aforementioned law was enacted after several public demonstrations organized by the Brazilian society to press the Executive and Legislative powers for the end of corruption. The clamour that filled the streets resulted in a rigid and innovative law, deserved of praise for having the purpose of truly punishing companies that cause damage to the Public Administration, but greatly criticized by several scholars.

By creating the strict liability of the legal entity, the Anti-corruption Law brought the legal situation in which the company may be punished independently of its effective agreement with the infringement. It occurs because the new legal regime introduced by Law No. 12,846/2013 and regulated by Decree No. 8,420/15, brought norms whose interpretation and application generate criticism and doubts regarding its compatibility with the Brazilian Constitutional system, with regard to the notion of culpability delineated from the Constitution. Another criticism about this law is that it provides for the possibility of applying strict liability even if the organization has not deliberate to commit illicit acts, as well as to present an effective system of prevention and investigation of irregularities that works within strict ethical standards, but the company will be punished if it is benefited by the behaviour of employees, or third parties, which are contrary to the norm, something that is not justified in a State whose constitution predicts that "no penalty will surpass from the person of the convicted" (Federal Constitution, art. 5, XLV).[42]

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[41] Nikkel, L. I., & Martins, D. M. (2015). A Responsabilização Objetiva na Lei Anticorrupção. *Programa de Apoio à Iniciação Científica*, p. 498.

[42] Nikkel, L. I., & Martins, D. M. (2015). A Responsabilização Objetiva na Lei Anticorrupção. *Programa de Apoio à Iniciação Científica*, p. 494.

With regard to territoriality, Brazilian legislation will have extraterritorial applicability in cases where the active subject is a Brazilian legal entity. Foreign legal entities, even active in the country, can only be held liable when involved in illegal acts against public administration.

The Brazilian law provides for the possibility of the leniency agreements, i.e., spontaneous collaborations of the company, providing evidence with respect to the other actors involved in the illicit act, and the company may benefit from a milder sanction.

Regarding compliance measures, unfortunately it is not mandatory for companies to implement Compliance Mechanisms in the Brazilian legal framework. The company that has internal integrity mechanisms and procedures can only be benefitted in terms of the dosimetry of the penalty. Bearing in mind the high costs of implementing those mechanisms, I believe this is not enough to aware corporations of the need for Compliance Instruments, which are so important in tackling corruption.

With the adoption of integrity measures and internal control procedures, the company only has the possibility of influencing the dosimetry of sanctions, according to Art. 7, VIII. However, while the anti-money laundering compliance is mandatory, anti-corruption compliance is optional, only encouraged by the reduction of the fines, which I believe is not an effective way to control corporate crime in Brazil.

As described in Law No. 12,846, article 2, the liability and punishment of the legal entity does not need that the infringements are committed with intent, recklessness or by negligence, since it is a strict liability offense. However, with respect to the administrator or legal representative, the law defines a fault-based liability with punishment to the extent of its culpability. In this way, there should be a demonstration of intent or serious fault. It is noted that the legislator chose to create two systems of punishment: strict liability for companies and fault-based for administrators and shareholders.

The sanctions proposed by the law are divided into administrative and judicial. The administrative sanction is divided into: fine (in the amount of 0.1% to 20% of the gross revenues of the last financial year prior to the establishment of the administrative process, excluding the taxes, which can never be lower than the illicit advantage), and the extraordinary publication of the sentence (in a media of great circulation in the area of the practice of the infringement and of the action of the legal person or, failing that, in publication of national circulation, as well as through the posting of notices, for a minimum period of 30 (thirty) days, in the establishment itself or at the place of activity, in a visible way to the public, and on the electronic site in the worldwide computer network). Sanctions may be applied singly or cumulatively.

With regard to the judicial sanctions, there is also the possibility of the forfeiture of goods, rights or values obtained from the infringement, in addition to the partial suspension or prohibition of the

company's activities, compulsory dissolution of the legal entity or prohibition of receiving incentives, subsidies, grants, donations or loans from public entities and public or government-controlled financial entities. The penalty of compulsory dissolution of the legal entity, because of its irreversible feature, has to be used in exceptional cases, when the legal entity proven to have been used or created to facilitate or promote the practice of illicit acts.

Brazilian Anti-Corruption Law has brought substantial advances in combating corruption, like the leniency agreement and the mention of the pillars of corporative governance: disclosure, equitable treatment, compliance and accountability. Another big step forward is Bill No. 5,895/2016, which defines the crime of corruption in the private sector, however until the present time was not voted by the Brazilian National Congress.

2.3 Conclusions

As pointed out, crimes become increasingly transnational as the effect of globalisation, and the need for assistance by international bodies to support States becomes evident. Many developing countries alone do not have sufficient resources to combat transnational crimes, and for that reason the aid of these organisms is of extreme help by preventing, investigating and repressing corruption and money laundering.

Another important role of International Institutions comes from the lack of harmonisation of Criminal Law among States, creating different classifications and sanctions, and mainly by the lack of initiative of some countries to typify certain criminal conducts. For that reason, International Bodies try to create, even if not mandatory to all countries, but at least the Member States should standardize and bring into their legal system the definitions brought in their Conventions or Regulations.

Among the Brazilian Anti-corruption law, the FCPA and the UK BA, we can verify substantial differences between them. Regarding the type of liability foreseen in the Brazilian law, like the Bribery Act, enabling the strict liability offense of the legal person, while the American FCPA is limited to a fault-based liability. Another difference is related to both FCPA and the Bribery Act, that ascribe criminal liability

to the legal entity that commit acts of corruption, and in Brazil it is not possible, the company will be held liable civil and administratively.

Regarding Compliance programs, we can see that both the FCPA and the BA, the measures are mandatory, and in the case of the BA may be cause of absolute defence for the crime of 'failure to prevent bribery', while in Brazil the compliance mechanisms only serve to reduce the penalty, not serving as a stimulus for companies to implement them with high costs and tiny benefits, what I believe to be a huge mistake of the Brazilian legislator, given the importance of these mechanisms in combating corruption worldwide.

3. CRIMINAL COMPLIANCE

As already seen in the previous chapter, the search for harmonisation of international legislation on economic crimes through International Institutions shows us its main targets as being Criminal Compliance and Corporate Governance, in addition to Criminal Liability of the legal person. However, the two instruments of criminal policy are complementary, since the main objective of Compliance is to prevent criminal (or administrative) liability of the organization, through a series of internal controls.

The main objective of this chapter is to demonstrate the importance of compliance instruments inside the modern business world, in the pursuit of transparency of business management as a way of avoiding the intrinsic risks of this economic activity and the committing of crimes within the corporate structure, and how these mechanisms can be used as a strategy to prevent the company's accountability, whether in the criminal or administrative context.

3.1 The challenges of criminal law in the new globalized society

Criminal law is always evolving to accompany the modifications of modern society. Society as a whole modifies itself and the science of law, by working with social phenomena, needs to adapt to the new social reality, where individual legal rights are giving way to the protection of diffuse and collective legal rights. Smanio acknowledges the importance of the theme and affirms that it is not about ignoring the human or person-based interest in the conception of the legal interest protected, whose individual guarantees are constitutional rights, but rather recognizing the social evolution and the importance of maintenance of the social system[43]. Thus, we can visualize a change in the protection of legal values affecting the social system, such as public health, the environment, political organization, etc.

[43] See Smanio, G. P. (2004). A Responsabilidade Penal da Pessoa Jurídica. Retrieved from http://egov.ufsc.br/portal/sites/default/files/anexos/12270-12270-1-PB.pdf

With technological advances and globalization, there is no more physical boundaries for the economic flow of goods, services and capital, and some problems were created for the States and their sovereignty[44], because crimes became transnational and more sophisticated, disseminating problems.

Today, more than ever, with the "weapons" we have in our hands, we can destroy the planet and mankind in a second, and this reality forces criminal law to respond to these dangers in a firm and revolutionary way, to protect those collective interests, reaching the population as a whole. The criminal law, as the *ultima ratio,* and when the gravity of the problem and its scope require its intervention, is then concerned with relaxing and updating certain rules previously defined to ensure the effective punishment of these crimes.

However, by admitting interference in other areas, such as business, economic, among others, its acceptance and legitimacy are challenged by many scholars. Criminal law, as we will see below, by imposing rules that are mixed between areas, can affect the activity of the State and the world market.

As Silveira and Saad-Diniz state, "criminal law, in dealing with man and his freedom, has a humanistic bias inherent to him. Its supremacy of those principles can be lost in a necessarily repressive, or worse, retributionist optics. Likewise, when dealing with man, as an individual, it does not seem correct to simply take it as part of equations and probabilistic calculations. On the other hand, the criminological view is usually not very fond of the perceptions that escape him. When other incidence orbits begin to act within their domains, there is a very significant difficulty in their acceptance. Criminal law has always intended to be the Lord of his own house, but it is not clear that this will be possible in a world that seeks the optimization of results, as today is perceived"[45].

As business organizations are a dominant reality in the world, with many companies with revenues larger than the GDP of many countries, we have to seriously worry about the responsibility of these organizations and their attitudes in the face of these changes in the global economic structure.

3.1.1 The development of capitalism and the expansion of criminal law within the business activities

[44] Braithwaite, J. (1982). Enforced Self-Regulation: A New Strategy for Corporate Crime Control. *Mich. L. Rev.*

[45] Silveira, R. d., & Saad-Diniz, E. (2015). *Compliance, Direito Penal e Lei anticorrupção.* São Paulo: Saraiva.

Throughout the twentieth century, with the development of capitalism, the concept of economic criminal law, created to regulate and apply legal provisions to offenses committed against the economic order, has gradually been improved to protect free market economy and to regulate the level of State interventionism in Economy.

Fragoso states that the economic offense has a restricted concept, whose legal objectivity lies in the economic order, that is, in supra-individual interests or goods that is expressed in the regular functioning of the economic process of production, circulation and consumption of wealth[46]. In other words, when the profit and the greed for power by means of shadowy and illicit conducts has the ability of exercise its negative influence on the economy, we are facing economic crimes, and the State's intervention becomes necessary. We will see how this level of intervention has been modified over time.

We must bear in mind that the birthplace of the entire regulatory idea and compliance programs were the USA. With the crack of New York Stock Exchange, in 1929, followed by an economic-financial crisis that spread throughout the planet, brought with it the collapse of mercantilist capitalism. The U.S. was already the world's first economy, and the entire world economy had to adapt to the new reality of economic stagnation.

The widespread belief in the United States was the culture of *laissez-faire*, where it is not the role of the State to intervene in the market economy, even if we are facing a criminal speculative offensive. And it plunged the whole world into a major global depression. The market's inability to rebuild itself alone and the need for state regulation was evident, however this takes a while to happen.

Only after Franklin Delano Roosevelt took office as President of the United States in 1933, and with the implementation of the *New Deal* programs to try to restructure the American economic policy, with strong influence from the ideas of economist John Maynard Keynes, the conception that the State should influence and regulate economic activity was instituted by replacing the conception of *laissez-faire*.

Thus, the state began to regulate economic activity through the creation of numerous regulatory agencies in order to correct its structural failures. The importance of regulatory agencies, as described by Oliveira, can be traditionally characterized by the high degree of independence in relation to the Executive and other powers. They concentrated on the competences typical of the three institutionally constituted powers: administrative (function of managing interests), "quasi-judicial" (resolution of conflicts of interests between regulated ones) and "quasi-legislative" (they have the power to edit general regulatory

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[46] Fragoso, H. C. (1982). Direito Penal Econômico e Direito Penal dos Negócios. *Revista de Direito Penal e Criminologia*, p. 1.

standards).[47] Thus the legitimacy of the intervention becomes a consistent and important reality for the resumption of global economic growth.

With the end of World War II and the need for European restructuring, an US initiative to launch a European recovery plan was created and called *Marshall Plan*. This plan has brought to Europe a new state model called welfare state, where the interventionist state with a protection stigma has ensured a minimum standard of social rights such as education, health, safety, housing, sanitation, among others, cumulated with a major intervention in the economy.

This U.S. hegemony as a world superpower, with the dollar overrunning the global economic-financial system[48], lasted without instabilities or oscillations until the 1970s.

At that time, several factors culminated in the return of a recessive period: the Watergate scandal, the Vietnam War, the oil crisis, thus forcing US to initiate a broad process of deregulation of the economy. That is the repeal of governmental regulation, in which the government decreases restrictions imposed on economic sectors, and regulatory agencies reduce intervention on private sector.

In the wake of globalization, a sense of uniqueness was created, and thereby a strong pressure from society for the deregulation of markets and the reduction of the importance of the state. Before the process of globalization, States were not used to worry about what was going on in foreign countries, however with economic interdependence resulted in integration between countries, wrong public policies undertaken by a State may impact on others. This interdependence has generated a need to standardize the rules of the game at international level. The whole world is now connected and the idea that the international market can regulate itself comes against the already rooted idea of intervention. Global trade is comprised of multinational and transnational companies, with the movement of goods in several countries. With its economic power, companies replace the state in regulating the market.

But at the beginning of the 2000s, the criminogenic environment created by the inappropriate deregulation of the economy gave rise to a range of corporate crimes. Those major scandals appeared with the colluding of external audit firms, contracted to accounting elaboration, valuation of assets and also to detect accounting problems and lack of transparency within companies. Companies such as

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[47] See Oliveira, R. C. (2009). O Modelo Norte-Americano de Agências Reguladoras e sua recepção pelo Direito Brasileiro. *Revista da EMERJ*. p. 162.

[48] Since the establishment of the Bretton Woods agreement, in 1944, the use of the U.S. dollar as an international currency has changed the structure of national financial systems. It attempted to establish general rules for the organization of the international financial system, in addition to creating multilateral institutions (IMF, IBRD, etc). It was created at the time an Exchange system that had the fixed exchange rates in terms of gold or of the United States dollar of specified gold content (although fixed, the rates were flexible according to the results of the balance of payments).

Enron, Parmalat, WorldCom, Tyco, Xerox, among others, have seen themselves exposed in financial scandals that have taken worldwide proportions. And the external audit firms were holding hands of those companies in the race to the bottom. Combined with it, the efficiency of self-regulation free of any regulation or state intervention was highly questioned because it was found that the market was extremely vulnerable.[49]

As always at the forefront, in 2002 the U.S. took a step forward and edited the Sarbanes-Oxley Act, an important instrument for controlling corporate activity, establishing civil and penal sanctions for companies that, operating in the American market, act by illegal accounting practices. But this law was not enough to avoid the economic-financial crisis of 2008, called the 'Subprime crisis'. It was the most serious crisis experienced by the world economy after the crash of the New York Exchange Stock Market. Although in different levels, the whole world was affected and plunges into a serious economic recession.

For Alves and Verissimo, it is perceivable that, with the resurgence of the international financial crisis and the expansion of the risk of recession on a global scale, the governments of the developed economies have engaged in an aggressive movement to defend the solidity of their financial systems, given the inability of the markets to self-regulate. In this strategy of defence, the central banks of the United States and Europe injected large volumes of liquidity into the banking system, negotiated relief operations to some problematic institutions, and promoted reductions in basic interest rates, to restore liquidity in the various markets. So, in a way, it is observed that the Governments of the major developed countries reacted and acted together with measures to support financial systems to mitigate the mistrust of economic agents. It is worth noting that, despite the action of the Governments of the developed countries, the climate of investors mistrust remained in relation to the solution of the financial crisis, a fact that motivated the migration to applications in U.S. Treasury bonds to the detriment of other assets, resulting in a drop in asset prices, increased risk of emerging market securities and depreciation of exchange rates in these countries. The changes in the credit conditions reflected on the indicators of economic activity, with a production decline and increased unemployment, reflecting a very cautious posture of consumers and entrepreneurs in the decision-making of consumption and investment. [50]

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[49] See Sarcedo, L. (2014). Responsabilidade Penal da Pessoa Jurídica: Construção de um novo modelo de imputação, baseado na Culpabilidade Corporativa. *Tese de Doutorado Faculdade de Direito da Universidade de São Paulo*. São Paulo. pp. 25-28.

[50] See Alves, T. G., & Veríssimo, M. P. (2010). Política monetária, crise financeira e Estado: uma abordagem keynesiana . *Perspectiva Econômica*, p. 28.

Countries previously immune to global economic problems and economies taken as sustainable and developed, such as European countries, suffer up until now the effects of the crisis, caused by the increase in public debt that occurred due to emergency spending necessary to prevent a collapse of those economies.

But now governments have acted faster and stronger, in the search for solutions to the problems brought with these global economic crises, and again the world saw the need to act against corporate crimes to restore confidence in the market. Thus, arose the idea of enforced self-regulation.

3.1.2 Enforced Self-Regulation

What we must learn from the crisis of 2008 experience is that it originated directly from the lack of regulation of the markets and that, therefore, it is necessary to edit new rules to avoid new crises. Of course, this was not the only reason, countless variables are involved, such as political, social phenomena that, combined with economic and financial factors, generate a failure of market regulation.

Self-regulation is closely linked to the transformation of the activities exercised by the State nowadays. Self-regulation is nothing more than the privatization of attributes that were previously exclusive to the States, to regulate business activity. Everything derives from the state's inability to regulate business relationships from outside, since they have internal self-regulatory systems and an increasingly developed departmentalization. As companies become larger and involve more diversified activities, with division of labour, responsibilities and increasingly complex hierarchical structures, it difficult the state's task in imputing sanctions to crimes.

Thus, the state starts to transfer its power to control the corporative conduct and its sanctioning power, failing to act directly in the repression and prevention of crimes, being only a regulator and monitoring agent, but still with powers of sanctioning. In this regard, Criminal Compliance arises as a mechanism of control of illegal behaviours. In addition to preventing crimes, Criminal Compliance also prevents financial loss, the loss of company's assets, and still protects the reputation and image of the legal person. Another great advantage of this mechanism of control is the possibility of individualization of conducts practiced by all the employees involved, so the repressive entity can identify the real perpetrator of criminal conduct, assess its culpability and punish in a fair manner.

Calabro describes that self-regulation can be conceptually regarded as the ability of an organism to perceive internal and external stimuli and to establish its own rules of structuring and functioning to respond to these stimuli in the way that best ensure your balance[51]. In other words, external regulation influences the conduct, but does not command it. The company accepts external commands to define its own regulations, in order to know better its own demands, risks and facilitators.

After verifying that the processes of State regulation and deregulation have failed in the current economic and financial conjuncture of the markets, the States united themselves to avoid another possible collapse in the markets. States must require ethical conduct and stablish a minimum set of regulations and contingencies for companies, so that these companies can play their part in establishing their own rules, knowing better than anyone else the risks and challenges of the market that they are inserted.

So, governments, through their regulatory agencies, should review these rules, approve or reject them, and in approving them, monitoring not only the deployment but the entire process, to avoid crimes committed within the business scope.

The state is incapable of inserting itself within the corporate environment of each company so, in delegating the work to them, we can visualize more precise and effective rules in market regulation process. As the company itself defines its rules, it feels self-responsible for the risks that exist in its business environment and has an obligation not to disseminate them outside its corporate scope.

Unlike deregulation, companies must cooperate with the State in the process of regulating the activity, without a total removal from the hands of the state the capacity of imposing limits and restrictions on the functioning of the corporate environment and monitoring its implementations, thus avoiding crimes committed by these agents. It is not an alleged *laissez faire*, nor of total intervention in the process. It is a path of cooperation where the State assumes its inability to regulate the intense corporate environment, increasingly complex, to still have control of the minimum conditions to limit illegal and unethical conduct within the business structures, where those actions are capable of achieving and affecting the market as a whole.

With the greater involvement of companies into the process thus increases their responsibility and culpability in actions and conducts, in case of failure to comply with previously defined norms. We can

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[51] Calabro, L. F. (2010). Teoria palco-platéia: a interação entre regulação e autorregulação do mercado de bolsa. *Dissertação de Doutoramento em Direito Comercial da Universidade de São Paulo*, p. 44.

say that we are facing a Preventive Criminal Law, and no more repressive, treating the conducts in an *ex ante* posture, so as to avoid excesses and errors.

In an article published in 1982, Braithwaite[52] already defined that the best strategy for controlling corporate crime was enforced self-regulation, because government lacks the necessary scope and companies have no interest in effectively self-regulate itself voluntarily. An efficient system of corporate regulation would acknowledge the social risks and social benefits associated with the activities of each regulated company and provide rules appropriate to those characteristics. Under direct governmental regulation, such adaptability over the wide spectrum of business types and sizes is impossible. Enforced self-regulation is by definition tailored to the particular needs and functions of each corporation. The rules written need relate only to a limited set of economic and structural circumstances rather than to a vast, incoherent range of business activities. In short, under enforced self-regulation, rules could be both simpler and have greater specificity of meaning.

In other words, the rules are more directly linked to the objectives of the company, thus being more easily obeyed. And the costs of yielding to compliance office directives are usually less than the costs of fighting the investigation, prosecution, and adverse publicity that may affect the company's reputation or image.

Enforced self-regulation can be expressed by the public monitor and enforcement of private rules. It encompasses a variety of conducts that are located at an intermediary point between the public regulation of traditional character and free self-regulation. Under enforced self-regulation, each company would write its own rules, the government should ratify them if those rules are in accordance with all of the guidelines set down by government policy, and then a violation of them would be an offense. The mandatory requirement of an internal compliance group to monitor the observance of those rules and recommend disciplinary action against violators is an important step to contain corporate crimes. Reports of violations are mandatory to the relevant agency.

According to Kempfer, the "public regulation of self-regulation is a new form of indirect intervention that, under the vision of a State withdrawal, historically hides unknown levels of intervention. It includes

[52] Braithwaite, J. (1982). Enforced Self-Regulation: A New Strategy for Corporate Crime Control. *Mich. L. Rev.* , p. 1467.

the establishment of control systems, and also the setting of standards governing the purposes pursued by the self-regulation."[53]

3.1.3 Globalization, Risk Society and the concept of Governance, Risk and Compliance

Globalization has brought wonderful possibilities of approximation and connection between distant places, the integration of markets, ease in the free movement of people, products and services, capital, investments, and major advances in the integration of different societies. But the other side of the coin is that it also brought risks with it. An uncontrollable flow of information shows us dangers before unimaginable.

The concept of risk has not emerged recently, but with globalization and technological development, the risks can spread with an unthinkable speed through the planet. With that, the concept of risk society[54] has spread.

With the advent of the technological revolution during the twentieth century, the information began to spread much faster due to the influence of mass media. This brought with it a sense of enormous insecurity for society, in order to visualize, and consequently fear, by remote problems. Criminal activities that were once concentrated in a certain space could spread across the planet.

In the vision of Kempfer, the concept of globalization can be seen as a global integration event, which intensifies social relations and attenuates territorial distance between events and that, therefore, is closely linked to the acceleration of a world economy and a market universalism. Globalization is, in summary, a systemic integration of the economy at a transnational level, based on the commercialisation of knowledge, efficiency, productivity and triggered by the subsequent expansion of business networks on a global scale, acting more and more independently of national political and legal controls. Although

[53] See Kempfer, J. C. (2018). Autorregulação Regulada e o Combatea mercantilização dos Direitos Humanos . *Revista Brasileira de Filosofia do Direito* , p. 84.

[54] Risk society is a term used to describe the way in which modern society organizes itself in response to risk. The term was coined by German sociologist Ulrich Beck in his book Risikogesellschaft (1986).

globalization cannot be reduced only to the economic phenomenon, the market is shown as the main motivator of the relations as one of the elements and characteristics of globalization[55].

In the words of Beck, "Global risks tear down national boundaries and jumble together the native with the foreign. The distant other is becoming the inclusive other - not through mobility but through risk. Everyday life is becoming cosmopolitan: human beings must find the meaning of life in the exchange with others and no longer in the encounter with like"[56].

When we talk about risks, we are talking about a future and uncertain event, that if it occurs, may cause impacts to companies, be they financial, legal, of management, among others. For risk prevention, we have to think of the most unpredictable and unlikely event in a proactive way and scale the consequences of it. Companies, or people working for companies, should measure those risks according to these two variables: the probability of this event (problem) occur and the significant impact it may cause.

This leads us to the possibility of corporate crimes, where the cause (the crime) that is a consequence of omissive or commissive human acts leads to consequences of those acts, that is, the possibility of being discovered and being punished for these crimes. The greater the probability of discovery and effective punishment, the less likely the acts are committed. And those perceptions of risks that can determine the choices and behaviours of individuals, companies, whether public or private, in their decision-making.

We need to know and to quantify these risks to weigh our actions according to the defined environment of possible consequences. Companies try to anticipate the risks inherent in their activity in order to build strategies to avoid future legal problems. This preventive conception has generated the need to create legal mechanisms and to define ethical conducts to guide the company's steps and to know where to follow or not. The riskiest paths should be analysed with stricter criteria in order to bring into the equation advantages or harmful effects.

According to Dannreuther and Lekhi, risk offers us a conceptual mechanism through which to determine the possible and/or likely outcomes of our actions in the face of the structural uncertainties thrown up by the social and natural world. In this way, risk helps to mediate between the known and

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[55] See Kempfer, J. C. (2018). Autorregulação Regulada e o Combate à mercantilização dos Direitos Humanos . *Revista Brasileira de Filosofia do Direito*, p. 75.

[56] See Beck, U. (2006). Living in the world risk society. *Economy and Society*, p. 331.

unknown by helping to construct a social context within which our actions have a definite range of definable outcomes. The perception of risk has become an increasingly significant characteristic within the politics and economics of contemporary societies[57].

The corporate image is one of the most important assets of any company, I believe that it is more important than profit itself, because the corporate image brings the identity of the company and the ability to attract external investments, and this should be very well evaluated during the risk management process.

The damage to reputation, when caused, will very rarely be forgotten or left behind, mainly with the power of mass media. The lack of processes capable of anticipating the different events enabled of damaging the company's reputation and those failures in the organizations can lead to serious damage, such as loss of its market value or even to the very exit of the market. Another important contribution in this discussion was made by Araujo and Kummel, saying that "legal persons have a variety of personal rights, which derive from predictions of fundamental rights, including the right to image. While for natural people the object of protection is their privacy, considered an integral protection of the individual personality; for legal persons, this right involves issues such as their reputation, their credibility, and why not say, their economic survival in the market"[58].

As defined very well by Menezes, "reputation is a valuable asset that is built by consistent, transparent and coherent actions and relationships over the years. This management is accomplished by aligning the strategic vision of the company, its organizational culture and the perceptions of stakeholders. The risks that can cause damage to reputations have a direct impact on the organization as a whole, affecting their credibility, their financial performance, reducing the support of their stakeholders and their ability to bring together different audiences in favour of a common cause. They usually originate from the gap between the reputation gained by the company and the company's reality, in the changes in values and expectations of its stakeholders or in the lack of action and internal alignment. The non-compliance with Regulation (classic example of gap between perception and reality)

[57] See Dannreuther, C., & Lekhi, R. (2000). Globalization and the political economy of risk. *Review of International Political Economy*, p. 575.

[58] See Araujo, L. S., & Kümmel, M. B. (2015). A exposição da empresa pelo empregado nas redes sociais. *3 Congresso Internacional de Direito e Contemporaneidade*. Santa Maria, RS: UFSM, Universidade Federal de Santa Maria, p. 5.

and the dissemination of practices classified as non-ethical appear as main vectors in the constitution of these risks."[59]

Risk assessment includes four important phases: risk identification, evaluation, mitigation and monitoring. Criminal Compliance is an important instrument for mitigating legal risks for the company. By fulfilling all the requirements regarding risk management, and compliance with norms and rules, the company can avoid legal and regulatory problems, if the ethical precepts are used in order to guarantee transparency and seek to achieve the interests of all stakeholders, whether internal or external to the company.

Uncertainty is inherent in any activity. What makes a company more competitive in the market is to be prepared for it, anticipating the problems that may occur and planning its own solutions to tackle these problems. Currently, risk management and the monitoring of problems capable of damaging the reputation to which a company is exposed constitute one of the main corporate challenges.

Globalization has generated an interdependence between companies, conglomerates or even countries or communities. A company on one side of the world can directly affect another on the other side, by affecting the market as a whole. Therefore, there is a worldwide concern in creating international regulatory guidelines in order to standardize necessary concepts and procedures for good corporate governance and compliance.

Despite knowing that the perception of risk is an extremely subjective concept, where several variables can influence companies or individuals, such as the environment, culture, political or financial crisis, among others, what is clear nowadays is that people are increasingly committed to analysing and trying to minimise risks. Dannreuther and Lekhi stated that this emerging 'risk consciousness' is so intensive that the management of risk is sometimes seen to be 'the most vital, and difficult, area in the politics of industrial nations.' Risk can be seen to have a direct and tangible impact on the actions of individual actors; on the calculations made by public and private institutions; on processes of policy formulation; on conceptions of governance and regulation in both the public and private spheres; and on the articulation of political ideologies.[60]

From this conception of risks and the need to avoid them in any way in order not to suffer pecuniary sanctions or damage to the image of the enterprise, the concept of integration of the three areas of

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[59] See Menezes, D. (2011). Gestão de Riscos Reputacionais: práticas e desafios. *ESPM Dialogo*, p. 18.

[60] See Dannreuther, C., & Lekhi, R. (2000). Globalization and the political economy of risk. *Review of International Political Economy*, p. 575.

knowledge has emerged: Risk Management, Corporate Governance and Compliance (Governance, Risk and Compliance - GRC), that gathered, make the company implant ethical and sustainable risk mapping practices inserted in its business environment through auditing and control, that aims to ensure compliance with laws, regulations, and codes of conduct, so as to prevent criminal or administrative liability for non-compliance.

The Board of Directors, which is responsible for the protection of the company's assets, have to insure correct governance of the organisation, with an effective system of internal controls in place to support the risk management process. Risk management is the key to the governance of the organization and to the protection of its assets (if they do not know the risks they face, they will not be able to implement proper and effective protection).

Governance is a system of management and business organization, related to the way the company's decisions are taken, coordinating all areas of management around a common goal, with transparency and fairness so that the various stakeholders are involved in the process (shareholders, administrators, employees, agents, consumers, etc...). Risk is the probability of an event that, in occurring, can directly impact the company's objectives. Due to avoid the negatively impact in the company, the organization needs to be careful and anticipate those risks and consequences, taking preventive measures throughout Risk Management. Compliance is one of the four pillars of Corporate Governance (gathered with fairness, accountability and disclosure), and an important tool for the internal regulation of companies. It was designed to keep the organization free from problems and accountability through the adequacy of standards and regulations, procedures and best practices. The interconnection between those areas is clear, bearing in mind that laws and norms are developed to protect all interests involved, the procedures must ensure that the results of the company are reached, according to the shareholders' expectations, the company's strategy must be implemented transparently to all the impacted ones.

Compliance in the business environment means to act according to the law, and it encompasses all legal and regulatory obligations as well as internal guidelines. Each enterprise, according to its field of activity and other appropriate variables, must define a set of procedures aligned with the highest levels of corporate governance, from the Board of Directors and involving all employees and stakeholders,

seeking to mitigate the risk to the reputation and the occurrence of crimes. And for that reason, compliance with a high degree of commitment is a necessary condition for effective governance.[61]

Therefore, the analysis, implementation and monitoring of controls used in each decision making are so important in the activities of operation and management of companies. The interconnection of these processes avoids conflicting environments within the organization and unnecessary spending.

3.2 The concept and the origin of Criminal Compliance – a brief explanation

With its roots in U.S. law, the first country concerned with the fight against transnational corruption, more precisely with the enactment of the FCPA (Foreign Corrupt Practices Act), created after Watergate Scandal. FCPA rules forced companies to keep books and records that accurately reflect their transactions and establish an appropriate system of internal controls, thus creating the mechanism of Criminal Compliance.

However, with the phenomenon of globalization, companies began to make financial and commercial transactions in a cross-border basis, and with that the international anti-corruption conventions had an important influence on the task of seeking the prevention of those crimes by the private sector. Not only the State is responsible for preventing, investigating and punishing offences, and more is required from private sector surveillance obligations in order to prevent corruption crimes.

The need to create compliance mechanisms came from this idea of "Enforced Self-Regulation". Nobody better than the company itself to know its reality and the reality of its market, so that regulations and codes of conduct can be more adaptable to the everyday life of its internal and external collaborators. However, some assumptions are given by the state, with companies seeking internal codes of conduct to better suit the reality. This is the "privatization" of combating corruption, that is, the initial responsibility for combating corruption is granted to the companies themselves, and no more to the States.

Compliance comes from the verb "to comply", which means to act according to the law, or an internal instruction, a command or a request. Some scholars also define the "compliance risk", or "integrity risk" as the legal risk of regulatory sanctions, financial loss or loss to reputation, which an

[61] See Gloeckner, R. J., & Silva, D. L. (2014). Criminal Compliance, Controle e Lógica Atuarial: a Relativização do Nemo Tenetur se Detegere. *Revista de Direito da Universidade de Brasília*, p. 150.

organization may suffer as a result of its failures to comply with all applicable laws, regulations, codes of conduct and standards of good practice (together, "laws, rules and standards").[62] The compliance mechanisms were created within a corporate perspective linked to the principles of ethics and good governance and have as their primary objective the prevention of economic and financial crimes, seeking to mitigate risks to the company's reputation and problems under the legal and regulatory aspect. Therefore, its main characteristic is prevention, from an *ex ante* analysis, to prevent the prosecution of the company. Thus, we can envisage a behavioural change of society, with the culture of prevention prevailing over punishment.

Compliance Management is a way to internalize procedures and regulations of norms and external laws, keeping the organization appropriate to all national and international legal precepts, through the study of these standardization and also through implementation, monitoring and auditing of these controls, in order to ensure the complete adequacy of the company to them.

The main objective of Criminal Compliance is to create mechanisms of internal controls to prevent criminal persecution and, consequently, criminal accountability. Compliance programs may be considered as mitigating or even an exclusion of liability of the legal entity if constituted at the time prior to the offence. Concern should not only be for moral principles and values, but also for the high financial costs caused to companies by administrative or penal sanctions.

In the fight against business crime, corruption and money laundering, in recent years, companies have developed increasingly specialised control systems to avoid criminality. This demonstrates a posture where Criminal Compliance has been set up as one of the priorities, in view of the current "witch hunt" in combating corruption. The financial loss of non-compliance can be overwhelming, not to mention administrative or even criminal sanctions to organizations or individuals. Depending on the type of crime, still exists the possibility of termination of the company. As it is a way of no return, that can lead to numerous damages to the company and, maybe, to the entire market of a certain place, it needs to be very well analysed and consequences should be weighed.

However, in some countries, as in Brazil, compliance is not mandatory. The costs of assembling structures and groups to deal with these issues are large and many companies tend to take the plunge

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[62] *Consultative Document - The Compliance Function in Banks.* (2003, October). Retrieved from Bank for International Settlements: https://www.bis.org/publ/bcbs103.pdf, p. 1.

of sanctions. However, it is better for the company to invest in ethics and integrity than believing on impunity. The costs of risking can be much greater than preventing.

For transnational companies, it is very important to invest in the Compliance sector to adapt internal regulations to the domestic and international laws and market rules, where companies maintain their activities. The risks are immense, the property of public multinational companies is increasingly diffuse, its internal structures are much complex and the problem of separation between ownership and control is even more evident.

La Porta asserted that investors' protection turns out to be crucial because, in many countries, expropriation of minority shareholders and creditors by the controlling shareholders is extensive. When outside investors finance firms, they face a risk, and sometimes near certainty, that the returns on their investments will never materialize because the controlling shareholders or managers expropriate them. Corporate governance is a set of mechanisms through which outside investors protect themselves against expropriation by the insiders, that can happen by simply stealing profits, selling outputs or assets at below market prices, etc. Such transfer pricing, asset stripping, and investor dilution, though often legal, have largely the same effect as theft. It means that the insiders use the profits of the firm to benefit themselves rather than return the money to the outside investors. In other words, Corporate Governance can play a significant role in defending the rights of minority investors, who are not present in big business decisions and daily management but can see all their investment disappearing by mismanagement or fraud.[63]

For Benedetti, the Compliance mechanism has a subjective and an objective element. The subjective element involves ethical, moral and legal duties, in which the company has free will to adopt or not adhere to compliance. The objective element covers regulations, practices of good governance, in the internal and external scope of the company, in accordance with the legislation relating to its area of expertise, in order to prevent or mitigate the risks or illicit practices, and the improvement in relationships with customers and suppliers. In the objective scope the compliance program is a legislative requirement that includes both individuals and companies, and their obligations, as well as the instructions for compliance.[64]

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[63] See Porta, R. L., Lopez-de-Silanes, F., Shleifer, A., & Vishny, R. (2000). Investor protection and corporate governance. *Journal of Financial Economics*, p. 4.

[64] See Benedetti, C. R. (2012). Criminal compliance: instrumento de prevenção criminal corporativa e transferência de responsabilidade penal. *Tese de Doutorado em Direito - Pontifícia Universidade Católica de São Paulo*. São Paulo, SP.

Besides being a regulatory and normative instrument, Compliance can act as a motivational instrument of ethical and behavioural standards, promoting a culture of integrity to prevent the practice of crimes, through training and monitoring the conditions of integration of employees and collaborators to these principles. I believe that the more integration in the process of making these regulations, the more integration there will be in conducts and attitudes of employees in the day-to-day reality of business life.

Basel Committee describes Compliance as a "function" of complying, that depends on people's awareness of fulfilling and executing what was imposed on him. It is not a fixed asset of the company, and the Committee provides recommendations through some principles: Board of Directors is responsible for monitoring Compliance Risk Management, approve compliance policy, keeping it permanently effective. The top management is responsible for evaluating the effectiveness of Compliance Risk Management, disclosure the Compliance policy and establishing a permanent and structured Compliance Area, which must be independent and must have sufficient resources to carry out their activities. The activities of the Compliance Area must be subject to periodic review by internal audit. And, last but not least, Compliance should be treated as a central activity for managing the risk. Some activities may be outsourced, but the responsibility is of the Chief Compliance Officer.[65]

The Compliance Officer must have total independence to serve as the focal point for compliance activities and must have direct access to the Executive Board, in order to avoid the practice of criminal activities. The responsibility of this professional and his/her team understands the implementation and daily monitoring of the activities foreseen in the work plan of Compliance. This includes setting standards for conduct, communicating these standards, dealing with breaches of these standards, and monitoring if all team of employees in the organization know and support the ethics standards. Furthermore, the compliance officer should constantly evaluate the procedures to ensure compliance with all legal requirements, that can be internal, external, domestic or international.

However, a question that is very much raised nowadays is the professional's accountability regarding the eventual breach of any legal precept by the company, if he/she can be held liable for possible breaches in his/her duty of supervision and if the "gatekeeper" position can be imposed on him/her. What most of the doctrine explains is that it will depend on each specific case, where the

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[65] ABBI e FEBRABAN. (2009). *Função de Compliance.* Retrieved from Associação Brasileira de Bancos Internacionais: http://www.abbi.com.br/download/funcaodecompliance_09.pdf, p. 8.

functions assigned to the gatekeeper position will be verified, because the responsibility of the Compliance Officer will depend on the functions that are attributed, always taking into account his/her position within the corporate structure, whether he/she has or not the capacity of decision and of administration, and whether he/she was required a different conduct of that practiced. Therefore, an improper misconduct cannot be automatically imposed on the Compliance Officer for its gatekeeper position.

The compliance area must establish regulations and standards in accordance with local legislation and ensure adherence and effective compliance. It should also ensure that the ethical principles and standards of conduct developed through the Code of Ethics (or Code of Conduct) are known and observed through training; disseminate the procedures and internal controls associated with processes, so that the entire company has knowledge; promote the culture of money laundering prevention by means of specific trainings and through the KYC policy – know your customer; implement a transaction monitoring system with the objective of detecting atypical operations; verify adherence to audit recommendations; among other obligations.

The Code of Conduct, also called Code of Ethics, is a fundamental element in every compliance program to prevent or detect offences that may occur within the company. It refers to the adoption of behaviours necessary to the company's good progress, and the adoption of compliance mechanisms can mitigate the responsibility or even avoid it, depending on what is provided in the legal order of the country in which the company is developing its activities.

According to the booklet "Compliance function" elaborated by the Brazilian Association of International Banks (Abbi), through the Compliance Committee, and by the Brazilian Federation of Banks (Febraban), by the Compliance Commission, we can summarize the history of activities related to the implementing of Compliance mechanisms internationally: In **1913**, there was the Creation of the Board of Governors of the Federal Reserve in order to implement a more flexible financial system, safer and more stable; in **1929** the New York Stock Exchange Crack; in **1932** the "New Deal" interventionist policy, during Franklin Roosevelt's administration, that implemented Keynesian concepts, where the state must intervene in the economy, in order to correct the natural distortions of capitalism; in **1933/34** the American Congress voted measures with a view of protecting the securities market and its investors – Securities Act and there was the establishment of the SEC – Securities and Exchange Commission; in **1940** there was the enactment of the Investment Advisers Act and Investment Company Act; in **1945** the Bretton Woods Conference – the Establishment of the IMF – International Monetary Fund and IBRD – International Bank for Reconstruction and Development, with the objective of ensuring the stability of

the International Monetary System; in **1960** began the Compliance Era; with SEC insisting in the need of hiring *Compliance Officers* to *create internal procedures control; training people; and monitoring in order to help business areas to have effective supervision;* in **1970** there was the Option Market's development and Methodologies of *Corporate Finance, Chinese Walls, Insider Trading, etc.* ; in **1974** happened the Watergate Scandal, which demonstrated the fragility of controls in the American government, the misuse of the political-administrative machine to serve particular and illicit purposes was clear, and also the creation of the Basel Committee on Banking Supervision; in **1980** Compliance expands itself to other activities in American Market; in **1988** the first Basel Accord was enacted, known as Basel I, focuses on the capital adequacy of financial institutions, and also there was the enactment of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; in **1990** the 40 Recommendations about Money Laundering of Financial Action Task Force; in **1995** Barings Bank bankruptcy favoured by the weakness in its internal control system, Basel I - Supervisory Rules for the international financial market was issued and also the Egmont Group[66] was founded in order to promote the exchange of information, the receipt and treatment of suspicious communications related to money laundering from other financial bodies; in **1998** there was the Internal Control Era, in Brazil there was Enactment of Law No. 9,613/98, in order to combat money laundering and concealment of assets, the prevention of the use of the national financial system for illicit acts and creates the Financial Activities Control Council (COAF), The National Monetary Council, adopting for Brazil the concepts of the 13 principles concerning the supervision by the administrators and evaluation of internal controls of the Basel Committee, published Resolution No. 2,554/98 which provides on the implementation of internal control system, and also a study Program about Basel II – Supervisory Rules began, and a Political statement and Action Plan against Money Laundering, adopted at the special session of the United Nations General Assembly on the world drug problem; in **2001** a failure in Internal control and accounting fraud lead Enron to bankruptcy, and also there was the enactment of the US Patriot Act; in **2002** a failure in Internal control and accounting fraud lead WorldCom to bankruptcy; and there was the enactment of "Sarbanes-Oxley Act", ruling that companies registered in the SEC must adopt best accounting practices, independence of auditing and creation of an Audit Committee; in **2003** the National Monetary Council

[66] The Egmont Group of Financial Intelligence Unit was created to provide FIUs around the world a forum to exchange information confidentially to combat Money-Laundering, the Financing of Terrorism and other predicate offences. This group of FIUs met at Egmont Arenberg Palace in Brussels, Belgium, and decided to establish an informal network of FIUs for the stimulation of international co-operation.

in Brazil publishes the Resolution No. 3,198 which deals with independent auditing and regulates the institution of the Audit Committee, with functions similar to those published by "Sarbanes-Oxley Act", the Circular-Letter No. 3,098 that obliges for registration and communication to Brazilian Central Bank of deposit operations or withdrawals from R$ 100.000,00 (one hundred thousand reais) and also the establishment by Basel Banking Supervision Committee of the recommended practices for operational risk management and supervision.

As we have noticed, since the Crack of the New York Stock Exchange (late 20s), we have clear signs of movements seeking the improvement of the internal control system, and there are records of Compliance Mechanisms.[67]

And there is the increasingly need for ethical and moral standards to be followed and mainly monitored within companies, and if not fulfilled, punished effectively and efficiently. This need is increasing in a society where the pursuit of power and profit at any cost is a reality. Technological, scientific, social developments, opportunities, speed in the displacement of people and information, among others, have brought with it a disruption of ethical and social standards, today there is no difference between the right or wrong, if the wrong is not punished strongly. The allowed and forbidden are mixed, in the hands of unscrupulous people with thirsty for power. The pursuit of self-realization to the detriment of following rules is a reality. Effective punishment is the key to success.

According to Ribeiro and Diniz, "once this policy is implemented and effectively functioning, the company tends to gain more investors' confidence and greater credibility in the market. Thus, it will achieve high levels of internal and external cooperation, with the consequent increase in profit, but always in a sustainable way, bringing benefits to the organization, its employees and society."[68]

3.3 The adoption of compliance duties in Brazil

[67] *Documento Consultivo Função de Compliance.* (2004). Retrieved from Grupo de Trabalho ABBI- FEBRABAN: www.abbi.com.br/funcaodecompliance.html. Accessed in 14 Feb 2019.

[68] See Ribeiro, M. C., & Diniz, P. D. (2015). Compliance e Lei Anticorrupção nas Empresas. *Revista de Informação Legislativa*, p. 90.

Brazil, unlike the most developed countries, took a long time to implement legislation against corruption and money laundering. Only after the pressure of International Institutions to adapt their laws to the mandatory requirements of the International Conventions, and with the pressure of society before the corruption scandals that have harassed Brazil in the last years, Anti-corruption law and Anti-Money Laundering Law have been enacted.

With the creation of the Anti-Money Laundering Law (Law No. 9,613/1998), which was amended by Law No. 12,683/2012, there was a criminalisation of money laundering. This law influenced Brazilian legislators to create the Anti-Corruption Law (Law 12.846/2013), bringing into the Brazilian legal system, through legal transplants, mechanisms used in international legal systems, such as corporate liability of the legal person, despite having adapted to its reality some concepts, punishing civil or administratively for crimes committed within the business scope.

Anti-Money Laundering Law has brought several advances in the fight against corruption, a very ancient problem intrinsic to the Brazilian society. The first law, enacted in 1998, in addition to typify the crime of money laundering, created the COAF[69], the Brazilian Financial Intelligence Unit that has the function of regulating and applying administrative penalties to the corrupting agents, and the function of financial intelligence, by monitoring and seeking evidences of atypical financial movements and communicating investigative bodies when suspected of illicit operations. It identifies possible illicit cash flow and retransmit the information to the law enforcement agencies to investigate the origin of that money.

However, the biggest modification brought by the Law No. 9,613/1998, influenced from other international regulatory marks, was to introduce the concept of compliance duties in Brazilian legislation, by bringing the mandatory requirement of compliance obligations among some economic sectors. These sectors, holders of the duty of compliance, are obliged to identify all their customers through the KYC policy, record all transactions in national or foreign currency, securities, metals, or any asset that could be converted into money, if it exceeds the limit fixed by the competent authority. Those legal or natural persons defined in Article 9 has the mandatory duty of informing the competent authorities of the operations deemed suspicious, so that they do not fall under civil and administrative liability.

The modifications brought by Law No. 12,683/2012 have made the legislation more rigid in combating money laundering and related crimes, by excluding the exhaustive inventory of previous crimes

[69] COAF (Conselho de Controle de Atividades Financeiras) is the Financial Activities Control Board, directly linked to the Federal Government..

from the preceding law, in addition to altering, in its Article 1, the word "crime" for "criminal offence". In increasing the scope of the sectors obliged to provide information to Financial Intelligence Agencies, the capillarity of the system also increases in search of illicit money and the disarticulation of the criminal organization, the largest target of the legislator.

With respect to the standards of the FCPA, the compliance program may influence whether or not charges should be resolved through a Deferred Prosecution Agreement (DPA) or Non-Prosecution Agreement (NPA), as well as the appropriate length of any DPA or NPA, or the term of corporate probation. Many criticisms are made to the system because most agreements do not count on the participation of the judiciary. The Securities and Exchange Commission (SEC) is responsible for the civil execution of the FCPA, including its bribery provisions and about books and records. The Department of Justice (DOJ) is responsible for all criminal enforcement of the statute and the application of civil bribery provisions against non-issuers. SEC's Seaboard Report focuses, among other things, on a company's self-policing prior to the discovery of the misconduct, including whether it had established effective compliance procedures. Likewise, DOJ's Principles of Federal Prosecution of Business Organizations relate, either directly or indirectly, to a compliance program's design and implementation, including the pervasiveness of wrongdoing within the company, the existence and effectiveness of the company's pre-existing compliance program, and the company's remedial actions. DOJ also considers the U.S. Sentencing Guidelines' elements of an effective compliance program. [70]

These considerations show us that even if the company incur in failure to prevent a violation of FCPA standards, by showing that it has an efficient compliance program, with effective enforcement and if it is applied in good faith, the company can be benefited by those agreements and DOJ and SEC may decide not to choose for criminal prosecution.

The obligation to implement criminal compliance programs is a frequent clause in the agreements of NPAs and DPAs and is already been used in leniency agreements signed in Brazil, under the Law No. 12,846/2013. The leniency agreements, which are very used nowadays in Brazil, are an agreement between the state and an offender, where the state is benefited by evidences and facts relating to the crime committed in exchange for a lighter sentence or even of extinction of punishment. It is a bargaining tool with reciprocal obligations between a public and a private entity, which assumes the risks and

[70] *A Resource Guide to the U.S. Foreign Corrupt Practices Act By the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission.* (2012). Retrieved from https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf, p. 56.

accounts of confessing an infringement and collaborating with the State in the exercise of its repressive functions.[71] The leniency agreements, in the administrative sphere, has the same essence as the plea bargain agreement at criminal sphere.

In the UK Bribery Act the relevance provided by the Compliance Systems are even greater. The British legislator has created a corporate offense of failure to prevent bribery, and it brings serious consequences to the company that fails to comply with legal precepts. Therefore, the mandatory Compliance obligations, with a structured and effective system, can be used even as an exemption from punishment, considering that the system is not created to prevent absolute practices of corruption, but rather to avoid them and, if not possible, punish them efficiently.

Despite leaving at the discretion of each company to define its Compliance program, the English legislator defined some necessary components to be adopted: risk analysis and assessment; proportionality in the procedures to be followed by all stakeholders (clear practical and accessible policies and procedures); top-level commitment with the end of corruption practices; due diligence; internal communication and training; monitoring and regular review of the risks and procedures adopted.

Thus, in being verified all the necessary requirements of an effective compliance system, the judge has the discretion to file or not a criminal action against the company. If the program requirements are not met, it will incur a crime of failing to prevent bribery and may be criminally punished.

Comparing the three systems, we can verify that Brazilian legislators were not rigid enough to motivate companies to adopt Compliance Programs. Both the American and the British legislators have brought effective compensations on the sanctions and, on the other hand, also exemptions from punishment, for companies that fulfil their role by defining effective Compliance frameworks. For the Brazilian company, if there is no real threat, the advantages defined by the legislator are not able by themselves to motivate them to adopt compliance programs, because the company will not cease to be prosecuted or liable for having an effective program of Compliance, it may only have your sentence attenuated.

Most of the companies that have businesses in Brazil still invest in the inefficiency of the system in effectively monitoring companies, investigating crimes and punishing them in time, avoiding prescription and impunity. As in Brazil, Anti-Corruption legislation itself does not demonstrate an effective

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[71] Xavier, C. P. (2015). Programas de Compliance Anticorrupção no contexto da lei . *Dissertação de Mestrado Escola de Direito de São Paulo da Fundação Getulio Vargas*. São Paulo, p. 46.

advantage to stimulate the adoption of anti-corruption compliance, and companies continue to invest in impunity and the lack of rigidity of Brazilian laws.

I believe that the best way to continue fighting against corruption in Brazil is to increase the surveillance and detection of crimes by regulatory agencies, research and effective punishment, and the mandatory requirement of anti-bribery compliance systems in order to avoid corporate liability for crimes committed within the corporate environment. As in the American and British laws studied, if we create real benefits so as to the company, in good faith, adopts measures to prevent offenses within and outside its corporate environment, we can believe that we are on the right track to reducing cases of corporate corruption in Brazil.

3.4 Conclusions

Given the explanations about the need for Compliance mechanisms within companies, and their importance in the fight against corruption, fraud, money laundering, terrorist financing, among other crimes that we can list, what we see in global regulatory frameworks is an incessant search for stricter mechanisms of control that should positively influence the entire world community.

Unfortunately, this is not what we see emerging in Brazil nowadays. Legislators, influenced by schools of thought still attached to archaic concepts, and the dominant layers of society, afraid of being harmed by rigid mechanisms of control, do not accept legal transplants with the excuse of not fitting into Brazilian legal system.

Although Compliance is a mandatory procedure for companies or individuals who are engaged in activities more related to money laundering crimes, the same does not occur in Anti-Corruption Law. Compliance, as a mandatory procedure in the Anti-Money Laundering Law, companies that fail to comply with their legal provisions may be punished through civil and/or administrative liability, but in the Anti-Corruption Law, the lack of non-Compliance mechanisms brings no financial loss to the company. What I see as an incoherence, because Compliance mechanisms, so necessary to avoid crimes, is an important tool in the fight against corporate corruption and should be a mandatory requirement within the law dealing with the issue.

Companies are mostly moved by immediate profit, and the development of a Compliance framework is costly. Often, the lack of interference within the company is behind the economic development of it. Certainly, the decrease in dosimetry of the penalty will not be an incentive for small and medium-sized Brazilian companies to create systems and develop Compliance Areas within their structures. It's a shame, because it's about rowing against the tide.

4. CORPORATE CRIMINAL LIABILITY

As described in Chapter 2 of this dissertation, the main purpose of International Conventions against corruption is the search for the harmonisation of criminal law, but the type of accountability that each State will adopt is borne by it in accordance with the option that best fits to its legal system. Although most developed countries, such as the USA and most European Union countries, as we will see below, adopt the criminal liability of the legal entity, as it is a more assertive and effective policy for punishment, some countries, as the case of Brazil, still adopt the option for administrative and civil accountability of the legal entity. The Brazilian legislators and scholars justify their choice explaining that criminal law does not offer effective or rapid mechanisms to punish corporate societies. They believe that Administrative liability is technically targeted to be more effective in repression of deviations from corporate crimes, providing rapid responses to society.

This chapter aims to analyse the Criminal Liability of the legal entity, whether this political-criminal policy option is efficient for controlling corporate crime, and how States that already adopt this policy are working to contain corporate crime.

4.1 The difficulties to control corporate crime

International pressure for cooperation in global criminal matters, through International Conventions on Combating Corruption, brought up ideas of liability of the legal entities for corporate crimes, but do not impose accountability models on signatory countries. States must define the best options that fit their domestic legislation (even Criminal, Administrative or Civil Liabilities).

Civil Law is necessary for the compensation for damages caused, but the administrative law and criminal law are the only areas devoted to the normative protection of legal assets. Undoubtedly, the

criminal sanction, mainly due to the stigmatization of the criminal penalty imposed on the company, is more productive than the administrative penalty.[72]

In this research, we will verify that some countries opted for the Administrative and Civil liability of legal entities, as is the case of Brazil. Below, we will try to explain the motives of dogmatic objections referring to the subjects that dominate the discussions among Brazilian scholars. Some characteristics closely approximate the concept of Economic Criminal Law and the Punitive Administrative Law[73], because both in criminal and administrative matters, they face a situation that demonstrates the *jus puniendi* of the State.

The Brazilian legislator, in choosing the Administrative and Civil liability of the legal entity, rather than the Criminal Liability used by many countries, is mainly due to the difficulty of imposing on the legal person some concepts and criminal effects from the crime committed, as we will see below.

As already discussed at the beginning of the work, Criminal Law was initially created for the protection of individual legal assets, protecting individuals. The legal entity was created by individuals, as part of the development of societies, and for this it is necessary to be also subject of rights and duties. Thus, it is necessary to change the law to follow those transformations of society, where the protection of individual goods transmutes to a greater protection of supra-individual goods, which reach the society as a whole, serving for social purposes. It is the case of environmental protection, the protection of popular economy, public safety, public peace, among others.

With this, the concepts and laws created through an individual conception do not necessarily fit into the new characters, which are the legal persons. The companies, conceived through the will of natural people, were seen as a legal fiction, which depended on the will and action of their components to exist. For this reason, the principle "*Societas delinquere non potest*" was created, that is, society cannot commit a crime. Those who practice corporate crimes are the natural persons present in their composition. That is to say that the legal entity by itself does not commit crimes but can be held responsible for the practice of the illegal act (strict liability), being responsible for the mistake of someone else.

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[72] See Carli, C. V. (2016). Anticorrupção e Compliance: A Incapacidade da Lei 12.846/2013 para motivar as empresas brasileiras à adoção de Programas e Medidas de Compliance. *Tese de Doutorado Universidade Federal do Rio Grande do Sul*. Porto Alegre, RS, p. 280.

[73] Direito Administrativo Sancionador.

But by punishing only the individuals who are part of the company will suffice to prevent corporate crimes? If the natural persons which are components of the company can be easily replaced, would the crimes continue to occur?

The Brazilian Penal Code defines that the sanctions imposed must be proportional to the crime committed and the penalty cannot exceed the delinquent person. When analysing a crime committed by the legal entity, at first sight and with a superficial view of the case, the crime committed will always harm all shareholders and managers of the company, directly or not involved in the illicit committed, affecting people who did not participate in the decision by which the penalty is imposed. Therefore, it would be unfair to impute criminal liability to the company. But there are many issues involved that require a much deeper study.

Analysing the assumptions of Criminal Law regarding the concept of crime, we can define that crime is a human conduct contrary to the laws, thus violating a legal right protected by law. That is to say, it is a typical (described by law), anti-juridical (illegal), culpable and punishable conduct.

That typical conduct occurs when this voluntary human action goes against a defined norm, producing an illicit result contrary to the law, that is, an anti-juridical conduct. Culpability exists when there is a conscious attitude of the criminal, acting with intent or omission. Culpability has been defined as "the degree to which [an offender] may justly be held to blame for the consequences or risks of his act[s]."[74]Punishment is a consequence of the crime, that is, the sanction for a transgression of rights, freedoms and guarantees.

The conduct of the legal entity occurs through its collaborators or from its collegiate bodies. That is, the liability of individual components of the legal entity is attributed to it, but there are several forms in the doctrine of demonstrating this liability, which we will see next.

4.2 Corporate Culpability

In order to impute the liability of a crime to a legal person, we must bear in mind that the behaviour adopted should be unlawful, culpable and punishable. In order to impute a sanction to a reprehensible

[74] See Moore, J. (1992). Corporate Culpability under the Federal Sentencing Guidelines. *Arizona Law Review*, p. 746.

behaviour of the legal entity, it must have the capacity for action and culpability. And it is where scholars diverge.

But in the first place we must keep in mind the concept of what is a legal entity. These are created by individuals, legal figures created for specific purposes, an intangible legal entity, without body and without soul.[75] As Kist describes, for the creation of the legal entity, three principles must be present: the will of natural persons for its creation, the conformity with legal norms and conditions and its purposes in accordance with the law.[76] Entrepreneurial company is, according to art. 966 of the Brazilian Civil Code, the one who professionally carries out organized economic activity for the production or circulation of goods or services.

With the development of these corporations and their importance in the social and economic development of society as a whole, their activities were generating systematic risks and causing serious harm to society and also to free trade, generating in return the need for regulation and public policies for the containment of these crimes. Today, we can envisage that criminal liability of legal persons is a real need, in view of the ineffectiveness of fines and other administrative penalties or of civil liability.

Therefore, as Moore states: "Corporations are artificial entities, not biological persons, and thus may seem unsuitable objects of moral blame and accompanying stigma."[77], at the same time they are managed by individuals and bodies capable of being blamed for illegal attitudes.

After the Industrial Revolution, corporate structures became increasingly complex and developed, with organisational structures, decision-making and increasingly branched responsibilities, becoming much more difficult to elect the one to blame for misconduct in these large companies. But who would be held liable for the crimes committed through those organisations? Sometimes, this sophisticated structure is created to protect its shareholders from decisions taken by their managerial bodies, pressured by the formers to achieve goals that seems unreachable? Is it best to avoid punishing those crimes, in order to avoid the mistake of regulating and restricting free trade? I guess the answer is no, and we have to find in the doctrine and practice elements to overcome these difficulties.

According to Moore, although corporations always act through individual agents, and it is always an individual agent or group of agents who breaks the law, it is fair to say that corporations frequently

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[75] See Machen, A. W. (1911). Corporate Personality. *Can. L. Times*, p. 565.

[76] See Kist, A. (1999). Responsabilidade Penal da Pessoa Jurídica. *Rev. de Ciênc. Jur. e Soc. Unipar*, p. 142.

[77] See Moore, J. (1992). Corporate Culpability under the Federal Sentencing Guidelines. *Arizona Law Review*, p. 753.

cause their agents to violate the law. The behaviour of individuals in corporations is not merely the product of individual choice; it is stimulated and shaped by goals, rules, policies, and procedures that are features of the corporation as an entity. How to design these features to ensure that agents act predictably and in the interest of the organization, that is, how to control the behaviour of corporate agents is the central question of organizational theory.[78] It is difficult to measure how much the corporate culture affects these unlawful behaviours.

There are two theories that explain the corporate structure: The Fiction Theory, and the Reality Theory. The Fiction Theory, created and developed by Savigny, describes the company as a legal fiction, an unreal entity created for defined purposes, being incapable of delinquent by itself, because the personality of corporations is fictitious. The Reality Theory, explained by Otto von Gierke, demonstrates in the company a will identical to the human will, created by the joint will of the individuals who compose it, not being able to treat it as a fiction. The collective one exists, with its own will, being subject of rights and duties. When a company is formed by the union of natural persons, a new real person, a real corporate organism is brought into being.[79] These developments reinforce the relevance of real entity theory that applies to the firm in general and underlines the creation of legal entity status as an important role of the law.[80]

In countries using the Common Law system, such as USA and UK, criminal liability depends on two elements: the external or material element, which is the conduct or action, referred to as *actus reus*; and the internal or subjective element, the intentional or mental state of mind, referred to as *mens rea*. Perkins defines that "the *actus reus* is essential to crime but is not sufficient for this purpose without the necessary *mens rea*, just as *mens rea* is essential to crime (unless removed by statute) but is insufficient without the necessary *actus reus*". These concepts are clearly distinguished in the Latin maxim: *Actus reus non facit reum nisi mens sit rea*"- The act itself does not make a person guilty of a crime unless the mind is guilty.[81]

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[78] See Moore, J. (1992). Corporate Culpability under the Federal Sentencing Guidelines. *Arizona Law Review*, p. 753.

[79] See Machen, A. W. (1911). Corporate Personality. *Can. L. Times*, p. 568.

[80] See Gindis, D. (2009). From Fictions and Aggregates to Real Entities in the Theory of the Firm. *Journal of Institutional Economics*, p. 4.

[81] See Serjević, V. (2017). Economic Criminal Law: Comparative Overview. *Law and Politics* , p. 2.

Not all crimes require *mens rea*, these cases are described as strict liability. The strict liability theory holds that the defendant is prima facie liable for the harm caused whether or not either of the two further conditions relating to negligence and intent is satisfied.[82]

And hence the difficulty of imputing a consciousness of will to a fiction created by man. How do you recognise action and intent in an unreal one, bearing in mind the social harm it can cause?

It is difficult to define which wrongdoing acts and attitudes of their employees or representatives can be attributed to companies, in consideration of the financial, moral and social damages that these conducts can cause. Therefore, the conducts should be punished, but we have to define whether these acts can be imputed to legal persons or only to the individuals who have committed the wrongdoing.

For dealing with this issue, scholars created the theories explained below, which are used in different places and for different reasons.

4.2.1 The Respondeat Superior Theory or Vicarious Liability

The Respondeat Superior Theory, that means in latin "let the master answer", is a doctrine where the principal has vicarious liability for the misconduct of their employees, or agents that report directly to the former. Kraakman states that vicarious liability is the absolute liability of the company, a form of strict secondary liability, in contrast to secondary liability imposed on principals or other parties under a duty-based standard such as negligence. In the Common Law, the legal doctrine of respondent superior is the principal vehicle for holding principals liable for torts and other delicts of their agents. Under this doctrine, principals are jointly and severally liable for the wrongs committed within the 'scope of employment' by agents whose behaviour they have the legal right to control.[83] Even if the act was unauthorized but was in the scope of the function performed by the employee, the company can be vicarious liable for it. Thus, the company can be punished even if there is no unlawful conduct or the subjective element of the criminal intent (*mens rea*).

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[82] See Epstein, R. A. (1973). A Theory of Strict Liability. *The Journal of Legal Studies*, p. 152.

[83] See Kraakman, R. H. (1999). Vicarious and Corporate Civil Liability, p. 669.

Those concepts send us back to slavery times, where the roots of this type of liability are in the civil liability of the Lord for the acts of his slaves, the people who inhabited his property and were under his direction corresponded a duty of liability for the damage caused. The slaves could not afford by themselves for the damage, so the victim had his right guaranteed by the accountability of the Lord.

Afterwards, at the beginning of Twentieth Century, the United States Supreme Court used this doctrine in the case New York Central & Hudson River Railroad v. United States. Under that case, A corporations may be held criminally liable for the acts of its agents acting within the scope of their authority, if the agent acted to benefit the corporation. And those statements are still being used to support cases of criminal liability of companies in the United States in the federal courts.

Under the Principles of federal prosecution of business organizations in U.S. Attorney's Manual of the USA, "Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white-collar crime. Indicting corporations for wrongdoing enable the government to be a force for positive change of corporate culture, and a force to prevent, discover, and punish serious crimes. Under the doctrine of *respondeat superior*, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents. To hold a corporation liable for these actions, the government must establish that the corporate agent's actions (i) were within the scope of his duties and (ii) were intended, at least in part, to benefit the corporation. In all cases involving wrongdoing by corporate agents, prosecutors should not limit their focus solely to individuals or the corporation but should consider both as potential targets."[84] The corporation is always criminally liable, even if the offense is committed by those situated at the lowest levels of the organization. In this case the criminal conduct should be seen as a manifestation of the will of the company itself, through this transfer of the criminal will and of responsibility.

This theory is also described as the liability for facts caused by another agent and brings many disagreements between scholars for that reason. Many scholars believe that the company's civil liability would be sufficient to repair the damage dealt to the victim and to prevent new crimes.

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[84] The Unites States Department of Justice. Retrieved from: https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations. Accessed in 20 Mar 2019.

Others question the problem of guilt by corporate blameworthiness as the assumption of the *mens rea* as a required element of criminal policy, and the notion of criminal guilt is directly linked to the human person, not having the legal person ability to judge right and wrong. The general principle at common law is that corporate criminal liability requires personal corporate fault.[85]

The Alter Ego Theory already restricts the broader concepts of Vicarious Liability, despite being another example of indirect corporate liability.

The respondeat superior theory also is adopted, with insignificant variations, by the Australian Criminal Code, the Dutch Penal Code, and the Danish Penal Code.[86]

This theory is derived from agency principles in tort law. Because the *respondeat superior* standard focuses specifically on an individual's intent and imputes that intent to the corporation, the company's concern in the implementation of Compliance Instruments and Codes of Ethics are not taken into account because the company will be convicted if its agent commits the crime according to the necessary conditions.

4.2.2 The Alter Ego Theory or Corporate Ethos

A corporation is by definition a separate entity from its shareholders. The company has a distinct personality from the personalities of individuals that compose it, its managers, employees or agents. The Alter Ego Theory, or Corporate Ethos Theory tries to describe that the company has a "brain", developed by the company's senior management, identified as the company's individualized intent and will, the set of moral beliefs, ideas and attitudes taken by the company.

For Bucy, "each corporate entity has a distinct and identifiable personality or "ethos." The government can convict a corporation under this standard only if it proves that the corporate ethos encouraged agents of the corporation to commit the criminal act. Central to this approach is the assumption that organizations possess an identity that is independent of specific individuals who control or work for the organization. This corporate identity, or "ethos," results from the dynamic of many individuals working together toward corporate goals. The living cell provides an apt analogy: Just as a

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[85] Fisse, B., & Braithwaite, J. (1993). *Corporations, Crime and Accountability.* New York: Cambridge University Press. p. 47.

[86] See Maglie, C. D. (2005). Models of Corporate Criminal Liability in Comparative Law. *Models of Corporate Criminal Liability in Comparative Law*, p. 553.

living cell has an identity separate from the activities of its constituent molecules, a corporation has an identity separate from its individual agents. "[87]

In other words, despite using concepts related to individual culpability, this culpability, that is, the intent to commit crimes, is transposed to the reality of corporations through its "ethos", which has the power to encourage criminal conduct. But in order to frame the conditions of a criminal conviction, the company must have its intent demonstrated.

In relation to Compliance programs, the corporate ethos standards bring advantages to corporations that try to act in accordance with the law, but cannot avoid all committed crimes, thus motivating companies to implement and monitor an ethical and responsible behaviour. This characteristic is important for a change in corporate culture, because only condemning employees and agents for crimes does not necessarily cease the criminal corporate culture, because individuals can be easily replaced. What really modifies is a real compliance framework that can be monitored and audited among all employees, managers and shareholders, that is, by changing the criminogenic ethos to the law-abiding ethos.

These standards were firstly created by English Courts, expressed in case Tesco Supermarkets, Ltd. V. Nattrass, and since the requirements of reasonable precautions and due diligence had been met at the hands of those officers exercising management functions the conviction could not stand[88], and the use of the theory of vicarious liability no longer could be used. Today the same theory is also applied by the Australian, Canadian, and Finnish systems. The proposed standard of liability addresses this problem by punishing any corporation that establishes a lawless ethos which overcomes its employees' propensity to obey the law. To ascertain the ethos of a corporation, and to determine if this ethos encouraged the criminal conduct at issue, the factfinder should examine: the corporate hierarchy, the corporate goals and policies, the corporation's historical treatment of prior offenses, the corporation's efforts to educate and monitor employees' compliance with the law, and the corporation's compensation scheme, especially its policy on indemnification of corporate employees. [89]

We can say that this theory is based solely on the company's criminal liability in which the senior management commits illegal acts or is aware and encourages those acts. Only acts committed by the

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[87] See Bucy, P. H. (1991). Corporate Ethos: A Standard for Imposing Corporate Criminal Liability. Minnesota Law Review, p. 1099.

[88] See Fisse, W. B. (1971). Consumer Protection and Corporate Criminal Responsibility - A Critique of Tesco Supermarkets Ltd. v. Nattrass. *The Adelaide Law Review*, p. 114.

[89] See Bucy, P. H. (1991). Corporate Ethos: A Standard for Imposing Corporate Criminal Liability. Minnesota Law Review, p. 1101.

Board of Directors can be punished, because they are the "brain" of the corporate entity, that commands all other "organs". Moreover, it does not include crimes that rely on a defective organization, which will be exposed below.

4.2.3 Theory of Corporate Fault

The concept of Corporative Fault was originally created by Klaus Tiedemann, through the construction of the concept of unique corporate culpability of the legal person, and not derived from individuals who committed the illegal act. In drafting the theory of Corporate Fault by the Organization (Organisationsverschulden oder Organisationsfehler), he described the legal person as the holder of rights and duties, mainly duties of organization, in addition to moral and ethical duties whose violation constitutes a crime and such culpability should be held liable. These organizations have duties to adopt preventive measures of organization, care and control, through Compliance Mechanisms and Codes of Conduct implemented and monitored by the company, in order to avoid the practice of crimes in its midst. In verifying that the crime was committed by a member of the company, in view of the company's error in controlling these surveillance procedures, it should be held liable as a company's own criminal offence. Which turns out to be confused by company's negligence in not adopting the minimum care to prevent the committing of a crime.

There are two types of corporate fault: the preventative fault and the reactive fault models. The preventative fault occurs when corporations fail to implement procedures and policies in order to prevent a crime and is assessed as a fault prior to the commission of the offense, and the reactive fault occurs when a crime is committed, and the company fails to react appropriately to that misconduct. Both conducts rely upon a defective corporate culture and there is no need of finding a *mens rea*, relying upon negligence.[90]

For such imputation, it is not necessary to identify the offender who committed the crime, just to verify the guilt of the organization by the duty of care and control.

[90] See O'Brien, J., & Gilligan, G. (2013). Integrity, Risk and Accountability in Capital Markets. Oregon: Hart Publishing, p. 256.

And that is why the existence of an effective compliance program has become an important requisite to avoiding corporate criminal liability. On the other hand, this theory encouraged the adoption of compliance mechanisms by companies.

This model of culpability is considered by U.S. Sentencing Guidelines in United States and by UK Bribery Act. The Bribery Act 2010 created a new offence of failure by a commercial organisation to prevent a bribe being paid to obtain or retain business or a business advantage (if an offence is committed, the company can defend itself by proving that it has adequate procedures in place to prevent bribery). This is a strict liability, that does not require intention or recklessness. If it can be proved that someone representing the corporation as its "directing mind" bribes or receives a bribe or encourages or assists someone else to do so, then it may be appropriate to charge the organisation.[91]

The difference between the three theories are that organisation failure is a failure of the company itself, different of a failure of a high-level manager of Alter Ego Theory, as well as different from a failure caused by an employee or an agent whose conduct the company is vicariously liable.[92]

4.2.4 Model Penal Code (USA)

In practice and constant pursuit for the end of corporative corruption, the USA had greatly expanded the criminal liability of enterprises for crimes committed by their members, however the Congress of the United States has implemented the Model Penal Code, restricting the criminal liability of corporations to cases when "the commission of the offence was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment" (MPC, § 2.07(1)(c)). The MPC further allows the defence to exculpate the corporation and the high managerial agent from liability if the agent proves that he/she, in performing his/her supervisory power, employed due diligence to prevent the commission of the offence (MPC, § 2.07(5)). This standard still uses a *respondeat superior* model, but with a limited scope. The corporation will be liable for conduct of only some agents (its directors, officers; or other higher echelon employees). The MPC's requirement that a higher echelon employee commit, or recklessly

[91] See Alldridge, P. (2012). The U.K. Bribery Act: The Caffeinated Younger Sibling of the FCPA. Ohio State Law Journal, p. 1202.

[92] See Fisse, B. (1991). The Attribution of Criminal Liability to Corporations: A Statutory Model. Sydney Law Review, p. 286.

supervise, the criminal conduct is an improvement over the traditional *respondeat superior* approach.[93] Another great innovation brought by MPC is the transcription of general rules of culpability describing behaviours compatible with each objective element of each offense. The concept of mens rea inevitably meant a different state of mind for each offense.[94]

The MPC defined a culpable state of mind requirement for "each material element" of an offense, and the culpability requirement may be different for different elements of the same offense. The specific state of mind requirement necessarily involves recognition of the multifaceted nature of the mental state for each offense. [95] Model Penal Code section 2.02(2) defines each culpability term with respect to each of the three kinds of objective elements: conduct, circumstance, and result. The culpability level varies between Purposely, Knowingly, Recklessly or Negligently. The person who acts purposely must have a conscious objective to cause the crime. The person knowingly with respect to a result knows that this conduct can result in a crime, but even being aware that the result may occur, he/she runs the risk. The recklessness occurs when the individual is aware only of a substantial risk with respect to the result and acts careless. The person who acts negligently is unaware of the risks that he/she can cause and then should not be blamed for that conduct.

It was a project of the American Law Institute (ALI), and was published in 1962 after a ten-year drafting period. This Institute has analysed the penal system of the USA, defining the best practices and sanctions. The MPC was meant to be a comprehensive criminal code that would allow for similar laws to be passed in different jurisdictions. Unlike the Sentencing Guidelines, the Model Penal Code is not a legally-binding law, but it was widespread by the courts regarding the criminal liability of companies.

This kind of approach still brings some problems in accessing corporate intent, because it encourages higher level officials to be unaware of illegal conducts by corporate employee activity, so that they are not held liable for those acts, bearing in mind the difficulty in proving that they tolerated such conduct.[96] Therefore we can envisage a serious distortion in the vision of using Compliance Programs , so the MPC discourages this mechanisms in order to avoid criminal liability.

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[93] See Bucy, P. H. (1991). Corporate Ethos: A Standard for Imposing Corporate Criminal Liability. Minnesota Law Review, p. 1104.

[94] See Robinson, P. H., & Grall, J. A. (1983). Element Analysis in Defining Criminal Liability: The Model Penal Code and beyond. *Stanford Law Review*, p. 757.

[95] See Robinson, P. H., & Grall, J. A. (1983). Element Analysis in Defining Criminal Liability: The Model Penal Code and beyond. *Stanford Law Review*, p. 687.

[96] See Bucy, P. H. (1991). Corporate Ethos: A Standard for Imposing Corporate Criminal Liability. Minnesota Law Review, p. 1105.

4.3 Models of Corporate Criminal Liability adopted throughout the world

4.3.1 Model adopted by USA

All the discussions about the topic of Criminal Compliance and its consequences started in the United States of America.

In 1909, in the case New York Central & Hudson River Railroad v. U.S, the question of the criminal liability of legal persons was raised, whether they could commit a crime by itself or only the individuals that are part of it can commit the crime. The Court of the United States decided by the theory of the *respondeat superior*, a *civil law* principle of vicarious liability borrowed from tort law, which was adapted to criminal law and is up to the present day used to sanction companies that commit within the scope of his or her employment, and for the benefit of the corporation, and those conditions are expansively interpreted by the Courts.[97] This approach imputes to the corporation both the act and the intent of the corporate agent who committed the crime. The result was that the corporation was "culpable" precisely when, and to the extent that, its agent was culpable.[98] In that case, the Court decided that a corporation "may be liable criminally for certain offenses of which specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil. A corporation cannot be arrested and imprisoned in either civil or criminal proceedings, but its property may be taken either as compensation for a private wrong or as punishment for a public wrong."[99]

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[97] See Pieth, M., & Ivory, R. (2011). *Corporate Criminal Liability: Emergence, Convergente, and Risk*. Dordrecht: Springer, p. 65.

[98] See Moore, J. (1992). Corporate Culpability under the Federal Sentencing Guidelines. *Arizona Law Review*.

[99] New York Central R. Co. v. United States, 212 U.S. 481 (1909).

In 1958, in the Case United States v. A&P Trucking Co., the Supreme Court reinforced the theory of *respondeat superior*, by saying that even if the owner of the company is unaware or does not participate directly in the illicit act, it does not mean that the company can break the law.[100]

After those deliberations of American Courts that strengthens the belief in that system of vicarious liability, the Model Penal Code (MPC) proposed by American Law Institute, adopted the *respondeat superior* standard, describing the possibilities of exclusion of liability by the due diligence of then high managerial agents in preventing crimes inside corporate environment. But Courts still follow the NY Central precedent, notwithstanding a company's explicit policies and procedures to prevent and deter illegal actions, and the convict criminally the company to be held liable for acts even a low-level employee.[101]

After the creation of the Sentencing Reform Act of 1984, The United States Sentencing Commission promulgated the Federal Sentencing Guidelines ("the Guidelines"), which are rules defined to standardize sentencing policies for individuals and organizations convicted of felonies and serious misdemeanours in US Federal Courts system, avoiding disparities in sentencing system. The Act's basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system.[102] The first task was created to develop the sentencing guidelines for individuals. Only in 1991, the US Department of Justice defined the guidelines for organizations, and since that, according to Tuffin, the USSG "has provided a road map to Federal Judges on the thorny question of how to sentence business organizations for criminal wrongdoing."[103] The Guidelines defines the list of crimes that collective entities can be held liable, such as bribery, theft, negligent homicide, among others. The Chapter for Sentencing Organizations defines that generally organizations are vicarious liable for offenses committed by their agents. The four factors that increase the ultimate punishment of an organization are: (i) the involvement in or tolerance of criminal activity; (ii) the prior history of the organization; (iii) the violation of an order; and (iv) the obstruction of justice. The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and

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[100] United States v. A&P Trucking Co., 358 US 121, 126 (1958).

[101] See Pieth, M., & Ivory, R. (2011). *Corporate Criminal Liability: Emergence, Convergente, and Risk.* Dordrecht: Springer, p. 71.

[102] USSC 2018, Retrieved from https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf Accessed in 01/04/2019.

[103] See Tuffin, P. A. (2010, 06 24). *Effective Compliance and Ethics Programs Under The Amended Sentencing Guidelines.* Retrieved from: http://apps.americanbar.org/buslaw/committees/CL925000pub/newsletter/201007/tuffin.pdf, p. 1.

(ii) self-reporting, cooperation, or acceptance of responsibility.[104] In other words, in addition to creating a fairer environment taking into account the behaviours and characteristics of the company crucial to measure the sanction, the document defines the need for an effective compliance program to prevent the committing of corporate crimes and to measure the fairest penalty, encouraging companies to comply with the law by creating compliance mechanisms and an ethical conduct.

As Moore describes, the "Guidelines not only make organizational culpability a central feature of their provisions on fines and probation, they give concrete content to the notion of organizational culpability through the device of the organization's "culpability score""[105], trying to correct the determination of the Model Penal that fails to take account of the fact that corporations may be "justly to blame" even without the direct participation, authorization or tolerance of high managerial officials. The participation of the high managerial officials is an aggravating factor of a crime, in order to define the organizational culpability and sentencing.

In 2004, USSC amended the US Sentencing Guidelines enhancing the importance for effective compliance and ethics programs for evaluating the culpability score. As described in §8B2.1 of the Guidelines, "the organization shall take reasonable steps: (A) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct; (B) to evaluate periodically the effectiveness of the organization's compliance and ethics program; and (C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation." By exercise due diligence to prevent and detect criminal conduct and promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law, the organization can have lighter punishments or even not be criminally liable for the conduct of an agent.

In 2008, after the major Corporate Scandals such as Enron and WorldCom, USA called for a reform initially issued by the US Chamber Institute for Legal Reform, because some scholars believe that this system of vicarious criminal liability is bringing harmful and counterproductive consequences for companies.

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[104] USSC 2018, Retrieved from https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf Accessed in 01/04/2019, p. 509.

[105] Moore, J. (1992). Corporate Culpability under the Federal Sentencing Guidelines. Arizona Law Review.

Deputy Attorney General Mark Filip, in August 28, 2008, revised the principles of United States Attorney's Manual (USAM), in order to make this document legally binding for all federal prosecutors within the Department of Justice.[106] The cooperation of the company in the investigation is a mitigating factor, although the non-cooperation is not itself an evidence of the criminal conduct of the company. This Manual explicitly allows prosecutors "to consider a non-prosecution (NPA) or deferred prosecution agreement (DPA)'[107], besides a criminal indictment or a declination. This possibility was created in view of the disastrous consequences that a criminal conviction can create for a company, involving non-guilty third parties and unrecoverable financial problems for the organization.

Under a DPA, the charges are filled but the prosecutor can grant amnesty in exchange of important information derived from the organization that has to comply with specific requirements. Under an NPA, there are no criminal charges in exchange of the cooperation of the company (but the investigation remains pending until all the requirements demanded by the prosecutors are fulfilled). The DPA's and NPA's serve as an incentive for the companies to cooperate and gain protection from the prosecution in the form of deferral or even absolution from the charges altogether.[108] What has occurred quite often is that companies make NPA's or DPA's to collaborate, avoiding being charged, but the ones who are charged are individual employees.

Despite the *respondeat superior* standard, the use of Compliance Mechanisms and due diligence of the company can be a mitigating factor or even avoid corporate criminal liability.

4.3.2 Model adopted by the United Kingdom

The Bribery Act 2010 was enacted in order to comply with the obligations defined under the OECD Convention on Combating Bribery of Foreign Public Officials in cross-border business transactions. And by criminalising this conduct, it gives rise to corporate liability of legal entities. The convention states that "Each Party shall take such measures as may be necessary, in accordance with its legal principles, to

[106] USDOJ, Office of the Deputy Attorney General 2008b, Introduction, 2008.

[107] USDOJ, Office of the Deputy Attorney General 2008, USAM § 9-28.1000(B), Comment.

[108] See Serjević, V. (2017). Economic Criminal Law: Comparative Overview. Law and Politics, p. 31.

establish the liability of the legal persons for the bribery of foreign public official"[109]and "the bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties".[110]

Although the Convention leaves the determination for each country to implement domestic legislation according to its national legal system deemed appropriate, UK departed for one of the toughest and aggressive anti-bribery laws ever created. This is an important tool to avoid international corruption and to create a greater accountability inside those big corporations, mainly through the senior managerial, which is where the biggest decisions are made.

Until 2010, the prevailing anti-bribery laws were unappropriated (1906 and 1916 Prevention of Corruption Acts, and the Public Bodies Corrupt Act of 1989) because they were lacking in scope of bribery offence and related measures. Then UK decided to create the offence of "failure of commercial organisations to prevent bribery". Under this offence, a commercial organisation shall be held criminally liable if it fails to prevent persons associated with it from committing bribery on their behalf. That is to say, Article 7 of Bribery Act 2010 describes that the company will be charged by an offence if an associated person bribes another person in order to obtain or retain business or an advantage in the conduct of business for that company. Such an offence is committed where the advantage is aimed at seeking to influence the other parties in their capacity as foreign public officials. The intention to influence would suffice and ignorance cannot be claimed by those prosecuted under this provision.[111]

An "associated person" is a person who performs services for, or on behalf of, a commercial organisation, like employees, managers, agents, subsidiaries, etc. But if that company proves that, even after the occurrence of the bribery committed by its associated person, it nevertheless had adequate procedures in place to prevent bribery, the responsibility will not lie with the company.

The Ministry of Justice in 2011 defined the Guidance of UK Bribery Act 2010, and set six principles in order to guide companies to comply with those "adequate procedures" defined by law: Proportionate procedures (bribery prevention policies and the procedures proportionate to the bribery risks that the organisation faces); Top-level commitment (High Management must foster an ethical culture inside the organisation); Risk assessment (Identification and analysis of the risks of bribery in which the undertaking is exposed); Due diligence (a form of bribery risk assessment and a means of mitigating a

[109] (OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997) Article 2.

[110] (OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997) Article 3.

[111] See Yeoh, P. (2012). The UK Bribery Act 2010: Contents and Implications. Journal of Financial Crime. p. 43.

risk, by controlling policies and procedures on all stakeholders, including third parties involved in a business relationship with the organisation); Communication (including training); Monitoring and review.[112] Therefore, the organisation has to prove that it has an effective and widely deployed and monitored Corporate Governance Structure, a Compliance Mechanism in order to prevent bribery and an efficient Risk Assessment that the organisation faces. This means that any organisation that does have in place adequate procedures will avoid liability, even the biggest or the smallest company must implement adequate procedures to avoid prosecution.

Although commonly use the Alter Ego Theory (or Identification Doctrine), English criminal law decided to make companies liable on a vicarious liability basis because most bribery cases are executed by the company's lower employees and not by the senior management, acting on company's behalf. And being a strict liability offense, it does not require knowledge, intention, or recklessness. The defence of the organization is by proving the efficient and adequate procedures to prevent bribery.

The territorial application is another difference of English Law. The jurisdiction for the failure to prevent bribery has been extended provided that the person who has a close connection with the United Kingdom has a wide range of interpretations. And when an organisation is incorporated or formed in the UK, or that the organisation carries out its business or part of its business in the UK, Courts in the United Kingdom will have jurisdiction, irrespective of where in the world the acts or omissions which form part of the offence take place.

Even though the cases of corruption in the United Kingdom are not so numerous and disseminated by press, it is important to emphasize the rigid anti-corruption policy adopted by English law in expressing strict mechanisms and rules of imposition of criminal liability, and also the requirement for effective mechanisms of compliance to avoid the risks of criminalisation.

4.3.3 Model adopted by Italy

[112] The Bribery Act 2010 Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing. (2011). Retrieved from Ministry of Justice UK: http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf, Accessed in 14 Mar 2019.

Italy, as other countries of civil law tradition, always believed in the principle of the *Societas delinquere non potest*, that is, criminal liability has always been related to the natural person who committed the illicit act. However, following international pressure in view of social needs to incriminate legal persons for even more serious and more numerous crimes, Italy had to adapt to the new reality. Italian society had to overcome a major obstacle in article 27 of the Italian Constitution, which predicts that criminal liability is personal in nature. Some scholars said that in view of this provision, the idea of criminal liability of the legal person is impossible, being an element linked to individuals. The objection that criminal law is created for man raises a fundamental principle of criminal policy as a barrier to the criminal responsibility of the legal persons.[113]

Another object questioned is the problem of culpability, bearing in mind the necessity of negligence or intent as subjective element of penal norms, only not necessary in cases of strict liability. As Pieth and Ivory said, "Criminal law is aimed at physical persons, at spiritual man, who is in command of a faculty for self-determination, a capacity to choose between good and evil, and a creative and prudent intelligence, which allows him to freely fulfil his potential. Legal persons are legal fictions and so lack these attributes of personhood. Thus, they are not legitimate objects of the criminal law."[114] So, the lack of personality and the guilty intent presupposes that the legal entity cannot commit a crime.

Other scholars, in verifying the need to update the concepts after ratifying several international conventions, saw the "personal liability" as the liability in itself, and would fit both the natural and legal persons. But mostly it was the need for the harmonization with other European legal systems that made Italy to change their legal system.

Thus, Law No. 300/2000 was issued, introducing a model for direct responsibility of collective entities into its legal system, and art. 11 determines the liability of the legal person for committing crimes against the Administration and its assets, against public safety, against health and safety at work, and against the environment. The law in question dealt with the most important points of the new type of liability (terms of responsibility and its requirements, causes of exclusion of liability, criminal guarantees, sanctions, precautionary measures, prescription and competence), instructing the government to draw up a Decree establishing the administrative liability of legal persons and setting the immediate application of some of the rules of International Conventions. Hence the advent of Legislative Decree No. 231 of June

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[113] See Pieth, M., & Ivory, R. (2011). *Corporate Criminal Liability: Emergence, Convergente, and Risk.* Dordrecht: Springer, p. 256.

[114] See Pieth, M., & Ivory, R. (2011). *Corporate Criminal Liability: Emergence, Convergente, and Risk.* Dordrecht: Springer, p. 256.

8, 2001[115], instituting a form of punitive liability, has being described as a document of mixed sanctions, joining the administrative and criminal sanctions. The Decree disciplines the direct administrative liability for the acts practiced by legal persons, without mentioning it as criminal, but in a "*tertius genus" liability* regime anchored to the necessary requirements of Criminal Law (the commission of a crime), and governed by the strong guarantees of Criminal Law, but of treatment outside the penal system. The relationship between liability and crime led the *Corte de Cassazione* [116], in 2006, to understand the responsibility as criminal, despite the administrative nomenclature[117]. That is to say that this brings a profound discussion about the real legal nature of the responsibility of the legal entities in Italy.

Art. 5 of the Decree ascribes the *actus reus* of an entity, by establishing that the legal entity is responsible for the crimes committed in its interest or benefit, by persons who are representatives, directors or managers of the entity or its organizational units with financial and functional autonomy, as well as people who, in fact, control the legal entity; or persons under the supervision of a person previously referred. The individual is not responsible if the persons referred to in § 1 act solely in the interest of third parties. The Government's report defines the advantage in contrast to the concept of interest. The advantage would be the element that the entity may have obtained when the individual did not act in the interest of the legal entity. It would therefore be an objective evaluation performed retrospectively, regardless of the interest that motivated the active subject of the crime.[118]

Articles 6 and 7 of the Decree describe the criteria of imputation of culpability of the legal entity, that is to say, the *mens rea*. And here is described the importance of compliance mechanisms and codes of ethics to prevent criminal conduct and, thus, prevent criminal convictions for the company. The types of organization culpability described in those articles depend on the status of the individual that commits the crime, if high-level personnel (described in Article 6 as culpability deriving from the choice of corporate policy) or a lower employee (described in Article 7 of a corporate fault).

In Art. 9, the Decree defines the sanctions imposed on undertakings by unlawful administrative offences that depend on a crime, which may be pecuniary sanctions (fines), disqualification orders (so as

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[115] Legislative Decree No. 231 of June 8,2001, on the disciplining of the administrative responsibility of legal persons, corporations, and associations, including those lacking legal personality (in Italian: Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalia giuridica).

[116] *Corte di Cassazione* is the highest court of appeal or court of last resort in Italy. It has its seat in the Palace of Justice, Rome.

[117] The Corte di Cassazione, Sez. II, 30.1.2006, n° 3615 stated that "Notwithstanding the *nomen jures*, the new, nominally administrative liability conceals its substantially criminal nature".

[118] See Tesi, M. A. (2012). A Responsabilidade Penal da Pessoa Jurídica no Sistema Italiano. Revista de Direito Brasileira, p. 310.

interdiction; suspension or revocation of an authorization, license or concession; prohibition on contracting with public administration; exclusion of financing facilities or subsidies; or prohibition on advertising goods or services), forfeiture or publication of the judgement, in accordance with the seriousness of the crime committed, with a view to the function of preventing new infringements.

The Decree established a mechanism essentially with the preventive purpose of avoiding the commitment of crimes in corporate environment. It implemented rigid notions of corporate governance in Italian companies, with deployments of more effective compliance systems. The preparation of each model falls to the company, according to its characteristics, market in which it operates and corporate culture, and is essential to avoid criminal liability. According to PIETH and IVORY, "criminal sanctions will be incurred only residually, when the intermediate preventive mechanisms have failed due to the non-observance of the rules of compliance."[119] This means that if the crime occurred even after due diligence of the company of all regulatory requirements, the company cannot be blamed and held liable for it.

4.3.4 Model adopted by Spain

Spain has always been in favour of the principle of *societas delinquere non potest*, and contrary to the criminal liability of legal persons in view of the incompatibility of the legal entity with its capacity of action and culpability. But Spain has always adopted a preventive and punitive administrative responsibility. The Spanish Penal Code of 1995 has peremptorily denied the possibility of criminal liability of companies.

The Organic Law No. 15/2003, by modifying the art. 31.2 of the Penal Code, initiated a change in this direction, establishing a joint liability of the legal entity with the payment of fine, by the person acting on its behalf, thus establishing an administrative joint liability of the legal entity linked to a crime.[120]

With the enactment of the LO No. 5/2010, amending the Spanish Penal Code, it expressly introduced in Spanish legal system the possibility of criminal liability of the legal person (article 31 bis). Further, in 2015, a new amendment to the criminal code entered into force, introducing some changes

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[119] Pieth, M., & Ivory, R. (2011). *Corporate Criminal Liability: Emergence, Convergente, and Risk*. Dordrecht: Springer, p. 264.

[120] Diniz, E. S., & Silveira, R. d. (2015). *Compliance, Direito Penal e Lei Anticorrupção*. São Paulo: Saraiva.

to the first version of Article 31 *bis*. The intention, in addition to adapting to international norms, was to stimulate companies to adopt compliance programs and internal controls, thus avoiding the committing of crimes.

According to Article 31 *bis* of Spanish Penal Code, legal entities shall be criminally liable for offences committed in their name or on their behalf, and for their benefit, by their legal representatives or administrators, or by those who, being subject to the authority of the individuals above mentioned, may have committed the acts on account of not having exercised due control over them, given the specific circumstances of the case.

The same Article prescribes a rule in which legal persons may be exempt from criminal liability if: The Board of Directors has adopted and effectively implemented, prior to the committing of the offence, models of organization and management that include appropriate monitoring and control measures to prevent or reduce the risk of committing crimes; the monitoring of compliance model has been entrusted to an autonomous organ of the company (Compliance Department); the crime has been perpetrated by fraud, deceiving the organizational prevention models and that there has been no omission or failure in the exercise of their functions of monitoring, surveillance and control by that department. Article 31 Quater exposes the mitigating circumstances of the criminal liability of legal persons that may be considered to have carried out, after the commission of the offence and through its legal representatives, the following activities: a) confessed the infringement to the authorities, before knowing that the judicial proceedings; b) collaborated in the investigation providing new and decisive evidences, at any time of the process, to clarify the criminal responsibilities arising from the facts; c) proceeded at any time of the procedure and prior to the oral trial, to repair or decrease the damage caused by the offense; d) established, prior to the hearing of evidence, effective measures to prevent and detect offences that may be committed in the future with the means or under the cover of the legal person.

We can establish a very important role in the Spanish legislation of Compliance Mechanisms and its entire structure, with the effect of mitigating sanctions or even exemption from criminal liability of the legal person. The law stresses the need to differentiate the entities that has an institutionalized culture of Compliance of those who start adopting compliance measures after the criminal offence.

The Spanish legislation also follows the standard of the *respondeat superior*, being responsible for criminal conduct of its employees, when they do not follow internal control norms and due diligence to avoid crimes in the corporate scope.

In Article 33, item 7, the sanctions that may be imposed on legal entities held criminally liable for crimes are as follows: *per diem* fines or proportional fines; dissolution of the legal entity; suspension of the activities of the legal entity for a maximum period of 5 years; closure of all or some of the premises and establishments of the legal entity for a maximum period of 5 years; prohibition on engaging in activities through which the crime was committed, favoured or concealed; this measure may be definitive or temporary; barring from obtaining public subsidies, from entering into contracts with the Public Administration, and from enjoying tax or Social Security benefits and incentives for a maximum period of 15 years; Court intervention for a maximum period of 5 years to protect employees' and creditors' rights. The defined sanctions are different from sanctions defined for natural persons.

4.3.5 Model adopted by Portugal

The Portuguese law, with the enactment of Law No. 59/2007, of September 4, came to definitively remove the traditional standard of "*societas delinquere non potest"* in the context of criminal law, amending the Portuguese Penal Code to expressly allow, in its article 11, the criminal liability of the legal person, although previously admitted in secondary criminal law (under Decree-Law No. 28/84, which defines crimes against the economy and public health; and Decree-Law No. 15/2001, which defines the General Regime of Tax Offences).

However, the wording of the article makes us see the need of the Portuguese legislator to limit this responsibility. Firstly, it defines that the rule is the individual responsibility, that is, that of the natural person, but in some exceptions the legal entity can also be held liable. The legislator still excludes from the list of legal persons that can be held liable the State, the legal persons in the exercise of prerogatives of public authority and the organizations of public international law.

The crimes are described in a pre-defined catalogue in art. 11, 2, both commissive and omissive crimes, and among them we can emphasize the crimes of mistreatment; slavery; kidnapping; sexual violence; human trafficking; fraud; racial or religious discrimination; currency counterfeiting; damages to the environment; pollution; criminal association; influence-peddling; Bribery; active and passive corruption, peculate, among other specified crimes.

For the imputation of liability, it is necessary for the legal person to fulfil two requirements: the crime has to be committed on behalf of the company or in its interest (any benefit, not only financial), and by persons occupying a leading position, or by those who act under the authority of the persons referred above by virtue of a breach of surveillance or control duties they are responsible for (organisation fault). The organization cannot be held liable when the agent has acted against orders or express instructions from hierarchical superiors.

The crimes listed in art 11, paragraph 2, so as to criminally incriminate the legal entity, as being a personal corporate fault, there must be a connection between the behaviour of the agent and the collective entity. It should be noted that the connecting element is not the subordinate person, but the person who occupies a leadership position (and who violated his or her surveillance or control duties). Therefore, if it is possible to identify the subordinate worker who practiced the crime, but if the fact cannot be imputed to the manager of the activity sector [due to the omission of his surveillance and control duties], there will be no responsibility of the person entity.[121].

4.3.6 Model adopted by Chile

The Law No. 20,393, entered into force upon its publication in the Official Gazette on December 2,2009, and establishes the criminal liability of legal entities in Chile. This law was enacted to comply with recommendations to be a member of OECD.

With a limited list of offences, such as Money Laundering, Financing of Terrorism and Offences of Bribery of Chilean and Foreign Public Officials, it regulates the direct liability of legal entities for illicit acts committed. I suppose it is a very restricted list of crimes, not incorporating into Chilean legislation important areas such as the environment, economic crimes and other types of corporate crimes.

Article 3 defines the standard of liability, which establishes three cumulative requirements for an entity to be held liable for bribery offences: 1) The offence must be committed by a person acting as a representative, director or manager, a person exercising powers of administration or supervision, or a person under the "direction or supervision" of one of the aforementioned persons; 2) The offence must

[121] Sousa, I. R. (2016). Critérios da Responsabilidade Penal das Pessoas Coletivas: A Problemática da (não) Identificação do Agente do Crime . Dissertação de Mestrado em Ciências Juridico-Forenses apresentada à Faculdade de Direito da Universidade de Coimbra. Coimbra, Portugal, p. 33.

be committed for the direct and immediate benefit or interest of the legal entity. No offence is committed where the natural person commits the offence exclusively in his/her own interest or in the interest of a third party; 3) The offence must have been made possible as a consequence of a failure of the legal entity to comply with its duties of management and supervision. An entity will have failed to comply with its duties if it violates the obligation to implement a model for the prevention of offences, or when having implemented the model, it was insufficient.[122]

It is, therefore, a mixed regime of imputation of criminal liability, as we can verify the existence of a transfer of responsibility of the individual to the legal entity; on the other hand, it also defines an error of the legal person from supervisory or surveillance duties, that is to say, a corporate fault which requires a connecting fact relating the natural person that committed the crime with the legal person.

The organization, in order to be held criminally liable, must have infringed the obligation to implement a mechanism for the prevention of offences, or if implemented, was ineffective to avoid the committing of the crime.[123] That is, the implementation of compliance mechanisms is mandatory and very important in the imputation of criminal liability, according to Chilean law. The failure to comply with duties of management and supervision is an element of the offence rather than a defence. Therefore, the burden of proof lies on prosecutors, i.e. it will be up to prosecutors to prove that the entity failed to comply with its duties of management and supervision.[124]

If the organization is criminally liable for crimes, the sanctions can be fines; prohibition on entering into acts and contracts with public administrative organs; loss of fiscal subsidies; dissolution of illicit associations (when the strict purpose of the legal entity is to commit crimes); and confiscation (an ancillary sanction, together with the publication of the judgement in the Official Gazette and national newspaper).[125]

As we can see, the Chilean law was drafted in a way very close to the laws of the countries described above (but with a narrower catalogue of crimes), which was already expected, in view of the Chilean need to adapt its legislation to be a member of the OECD. And the role given to compliance systems was an important step in combating corruption.

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[122] OECD. Chile – Review of Implementation of the Convention and 1997 Recommendation p.4 Retrieved from https://www1.oecd.org/daf/anti-bribery/anti-briberyconvention/44254056.pdf, Accessed in 14 Mar 2019.

[123] See Pieth, M., & Ivory, R. (2011). *Corporate Criminal Liability: Emergence, Convergente, and Risk.* Dordrecht: Springer, p. 300.

[124] OECD. Chile – Review of Implementation of the Convention and 1997 Recommendation p.9 Retrieved from https://www1.oecd.org/daf/anti-bribery/anti-briberyconvention/44254056.pdf, Accessed in 14 Mar 2019.

[125] *I.e.* Article 173 § 5° provides that: "The proceeds from the offense and other property, effects, objects, documents and instruments thereof shall be confiscated."

4.3.7 Model adopted in Brazil

The Brazilian criminal law, since the enactment of the Penal Code in 1830, is adept of the principle "*societas delinquere non potest"*. Therefore, until now, some scholars are contrary to the criminal liability of the legal person.

The Federal Constitution refers to the liability of the legal entity in its Articles 173, §5, in crimes against the economic and financial order and crimes against the popular economy, and in Article 225, §3, in crimes against the environment, where expressly refers to criminal and administrative sanctions, irrespective of the compensation for the damages caused.

We can also point out the importance of the Law No. 9,605/98 in this issue, which deals with Environmental Crimes (Lei de Crimes Ambientais - LCA). In its Article 3, it describes: "Legal entities shall be held liable, civil and criminally in accordance with the provisions of this Law, in cases where the infringement is committed by decision of its legal or contractual representative, or of its Board of Directors, in the interest or benefit of its entity". So, we can see that Brazil adopted the Alter Ego theory, where there is a need for the will and awareness of the criminal act by the high management of the company.

Even with all the described legal devices, the doctrine still discusses whether or not this liability has criminal character. Some scholars, opposed to the theory, reject the responsibility of the legal person on the grounds of being a violation of the individual nature of the penalties or a form of strict criminal liability, when, in fact, the ambition is to deny the introduction of a revolutionary institute and therefore, for some, very dangerous in our legal system.[126]

However, much of the doctrine has accepted the innovations of the new law regarding the criminal liability of the legal entity. If the Federal Constitution itself has a normative command in favour, the legal legitimacy of the infra-constitutional norm is clear, opting the legislator for a criminal policy for environmental protection. The legal entity has the capacity of action through its employees, officers or agents, and thus to practice harmful acts to the environment, including of criminal nature.

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[126] See Dawalibi, M. (2002). Responsabilidade Penal da Pessoa Jurídica. *Revista Consultor Jurídico*. p. 2.

The aforementioned law, although constitutional, is not widely applied as it should in concrete cases, in view of the few records of judgments practiced by companies in environmental crimes. It is feared that the absence of specific procedural rules has made the law difficult to apply.

The technical defect contained in the law in not dimensioning the sanctions qualitatively or quantitatively, wounding the constitutional principle of legality enshrined in art. 5, XXXIX, where this definition will be borne by the judge, and may generate great legal uncertainty and an immense range of divergences between those sentences. Articles 21 to 24 only mention the penalties imposed, namely fines, suspension of activities, partial or complete ban of the establishment, ban on contracting with the Government or receiving subsidies, and providing services to the community.

However, returning to the initial theme of this study, which is the fight against corruption, and as already mentioned at the beginning of the work, the Law No. 12,846/2013 (The Anticorruption Law) was a response to the ratification of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and with the international agenda for combating corruption.

By enacting the Anticorruption law, the Brazilian legislature opted by Civil and Administrative liability of the legal entities, thus avoiding the controversies regarding criminal liability, bearing in mind that the Convention leaves the option in charge of the party, according to its legal system. Thus, Brazil opted for the Punitive Administrative Proceedings to solve the problems of corporate corruption.

The Brazilian Anti-Corruption law, in order to follow international legislation with respect to compliance mechanisms, mentions it in Article 7, VIII. However, as we can envisage in the course of this work, the International line of thought followed by most developed countries is to have a mandatory requirement to implement and monitor compliance mechanisms, promoting an ethical and preventive culture within companies. The Brazilian legislator has failed in this regard, because the mention of "the existence of internal mechanisms and procedures of integrity, auditing and reporting channels for irregularities and the effective application of codes of ethics and conduct within the scope of the legal entity" exists in the law only at the time of fixing the sanctions imposed on the company, and not as a way not to be held liable for the fault, when the company has adopted effective prevention mechanism.

The law was also silent by not defining the minimum standards for these mechanisms, nor has defined the rules for a valuation to reduce the sanctions imposed on the company.

Currently, we have seen a light in the darkness about transplanting important international legislation into Brazilian legal system. Transparency International, together with 373 Brazilian institutions, launched a legislative project in 2018, now sent in 2019 to the National Congress, with 70 new measures against corruption, including preliminary bills, proposals for constitutional amendments, resolution projects and other norms aimed at the control of corruption, seeking to use the best international practices to implement them to the Brazilian reality, in order to attack "the systemic causes of corruption and offer solutions for their long-term confrontation."[127]

4.4 Conclusions

Currently, the problem of corruption is not an isolated phenomenon. It is spread all over the planet. By bringing immeasurable social and financial damages, the search for the end of corruption and especially the end of impunity is a reality pursued by the entire globalized society.

The role of International Bodies in seeking harmonisation of criminal law is an important point to emphasize. With International Conventions in the pursuit of the end of corruption, money laundering, terrorist financing and transnational bribery, they have brought the obligation on signatory countries to update their legal systems in accordance with the instructions defined by these legislations.

Globalization has ended the boundaries between countries but has brought inside those countries risks before unimaginable. Despite being inherent in any activity and situation, the risks can be mapped and often avoided. This new "risk society" has demanded from companies new ways to manage its businesses, as well as new structures to improve corporate governance, and the implementation of compliance mechanisms, in order to avoid the commitment of crimes. This is a paradigm shift, where a repressive culture loses place for a preventive culture, much more efficient and less costly for both the

[127] Transparency International. 70 novas medidas contra a corrupção. *Retrieved from https://transparency.org,* Accessed in 02 Apr 2019.

company and society as a whole. In addition, these organizations are becoming increasingly larger and more powerful, incredibly increasing the exposed risks.

Based upon the main International Regulatory Framework, as the FCPA, the Bribery Act and other important legislation regulating corporate crimes, specially bribery, we can see the concern of those legislators in determining the mandatory requirements of Compliance Mechanisms in order to avoid the liability of the legal person for crimes committed by those associated persons. And that is where we can see the lack of strictness in Brazilian Anticorruption Law, where compliance programs exists only to help the judges on the dosimetry of the penalties.

And now we will try to answer the main question of this thesis: Is Corporate Criminal Liability a possible path for Brazil in the fight against corruption? Although the Brazilian law chooses the administrative liability of the legal entity, I believe that a criminal conviction is the best way to punish corporate crimes, but the road ahead is still uncertain. Corporate Criminal Liability accomplishes a useful function for law enforcement purposes by reflecting the society's need to ensure an effective punishment of corporations[128], besides the moral stigma and reputational loss that a criminal conviction can bring. Brazilian society must perceive criminal policy as being just and efficient and proportioned to the harm caused. After overcoming the objections relating to the culpability and individualization of the penalty aforementioned in the course of this dissertation, we can envisage that imposing criminal sanctions on a corporation can correct the corporate culture of the organization.

Today the Senate Bill No. 236 of 2012 that is still standing on the Federal Senate for the change of the Brazilian Penal Code also provides for the criminal liability of the legal entity, described in Art. 41, where private legal entities will be criminally liable for the acts committed against the public administration, the economic order, the financial system and the environment, in cases where the infringement is committed by decision of its legal or contractual representative, or of its collegiate body, in the interest or benefit of its entity.

In addition, a new Project, presented by Transparency International along with other 373 Brazilian Institutions and several specialists, brought the discussion of new 70 measures against corruption, with significant innovations, which we can enumerate some: incentive to integrity programs in the Anti-corruption Law (increases incentives for the company to establish Compliance programs to prevent acts

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[128] See Pieth, M., & Ivory, R. (2011). *Corporate Criminal Liability: Emergence, Convergente, and Risk.* Dordrecht: Springer. p. 86.

of corruption); mandatory Compliance Requirement for large biddings; criminalisation of private corruption; criminal liability of companies for private corruption (create instruments to criminally blame the companies involved with these practices); among others.

Therefore, we can see a clear movement of Brazilian society, claiming for stricter norms and considerable modifications, a cry for justice and fairness, as we see in international Regulatory Marks against corruption and corporate crimes.

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